Law notes

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VOLUME XV.

APRIL, 1911, TO MARCH, 1912.

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Suicide à la Socrates.

SYNCHRONOUS with the advent of the harem skirt the Code Commission of Nevada has recommended to the State legislature a statute which provides that when sentence of death is pronounced the judge shall allow the defendant to designate which method he prefers, death by hanging or death by poison. If the condemned person elects voluntarily to take hydrocyanic acid, the prison physician shall provide him at the order of the warden, at least ten minutes before the time for carrying out the death sentence, with a sufficient quantity to cause instantaneous death. This shall be written on the bottle:

"There is contained herein a sufficient quantity of hydrocyanic acid to cause instantaneous death. You are authorized to take the same for the purpose of carrying into execution the sentence of death heretofore pronounced against you."

Should the prisoner fail to take the poison then it is enacted that he shall be hanged forthwith. From an authoritative source we learn that this acid, often called prussic acid, is a poison so energetic that "one drop of the pure acid causes instant death if placed inside the eye." A professor in the Northwest Social Settlement of Chicago expresses the belief that the plan may mark a pioneer movement that will be followed by other states. But the director of charities in Pittsburg sensibly says: "The spiritual advice prisoners get after they are condemned would be opposed to suicide, and it is doubtful if one out of a hundred would accept the penalty of taking his own life."

"Or that the Everlasting had not fix'd
His canon 'gainst self-slaughter!"

We observe that the proposed statute does not provide that the label on the bottle shall be read to the proposed suicide in case he cannot see to read or is illiterate. It is also rather sesquipedalian for low-browed murderers. We recommend this substitute:

"Here is stuff that will kill you right off. Drink it, and God save your soul."

If the label should not sufficiently apprise the condemned man of the nature of "the worm," because it was defaced and illegible, and the sheriff being ignorant of the fact should hang him, would the sheriff be guilty of murder?

Women Jurors.

IN the State of Washington last fall a constitutional amendment was adopted giving to women the full right to vote. Of course other rights and duties are incidentally conferred or exacted. For obviously good reasons the legislature passed an act, March 4, conditionally exempting women from jury duty. The measure is in the nature of a compromise, giving a woman the right to be excused on account of her sex from service on juries, but permitting her to serve if she so desires.

None but an exceptionally ingenious mind could suggest plausible grounds for doubting the wisdom of allowing women to sit as jurors in many classes of important cases. Women are constantly disposing of their property by will, and, for aught we know, they uniformly exhibit as good judgment in the matter as men do. We recollect a case where a man bequeathed all his estate, which consisted entirely of two or three thousand dollars in personal property, to a big and well-known missionary society, thus leaving his widow destitute, as he had a right to do under the local statute, except for the power vested in the probate judge to allow her an amount necessary for support during the settlement of the estate. In the particular case the indignant judge stretched his authority to the extent of giving the widow nearly all of the property, and the missionary society sent its agent into the country county to have an appeal taken from the order of allowance. Application was first made to the best lawyer in the region, an ex-judge of the County Court. "Sir, your society has not money enough to employ me for that purpose," was his answer to the agent. Other reputable lawyers gave a like response, and in the end no appeal was taken. Returning to our topic, could anything be clearer than the eminent propriety of having intelligent women participate in the decision of cases, for example, where wills are contested on the ground of testamentary incapacity or of undue influence?

By service on juries the mental stature and symmetry of women will inevitably be tremendously affected in a direction highly beneficial to the community if they are to be equipollent with men at the ballot box. Altogether, there may ensue a female renaissance paralleled by what has been observed in respect of town meetings, which were coeval with the settlement of New England. These gatherings of the people have been pronounced by students of political science who have closely examined their methods of operation and the influence exerted by them to be the most potent agents in promoting the art of self-government that the world has ever known. Fiske's "Civil Government in the United States," page 31, has an inter-

esting and eloquent dissertation on town meetings, wherein the author says:

"In the kind of discussion which it provokes, in the necessity of facing argument with argument, and of keeping one's temper under control, the town meeting is the best political training school in existence. Its educational value is far higher than that of the newspaper, which in spite of its many merits as a diffuser of information is very apt to do its best to bemuddle and sophisticate plain facts."

Will the new conditions imminent or already established in many states and countries operate to denaturalize the women? In Rev. Henry N. Hudson's edition of Shakespeare's works he says that very few indeed of the poet's men are so highly charged with intellectual power as is Portia; and yet the essential grace of womanhood seems to irradiate and consecrate the dress in which she is disguised in the great trial scene. Mrs. Jameson, with Portia in her eye, intimates Shakespeare to have been about the only artist, *except nature,* who could make women wise without turning them into men. But we are "running past the signals," as the phrase goes, and must heed our readers' admonition that this magazine is called "Law Notes."

Verdicts of Nine to Three in Criminal Cases.

In the California legislature Senator Boynton has introduced a constitutional amendment to permit a verdict to be given in criminal cases by nine out of twelve jurors, notwithstanding dissent of the other three, except in respect of crimes punishable by death or imprisonment for life. It is said to be recommended by the California State Bar Association. Unanimity was one of the peculiar and essential features of trial by jury at the common law. We are not aware that this requirement has been relaxed in more than one State, except in civil cases in California. The Constitution of Utah provides that "in criminal cases the verdict shall be unanimous," but that "in civil cases three-fourths of the jurors may find a verdict." Undoubtedly the proposed constitutional amendment in California cannot be held obnoxious to any provision in the United States Constitution. See *Maxwell* v. *Dow,* 176 U. S. 581. But in States where the constitution guarantees jury trial without qualification it seems that the legislature cannot dispense with unanimity. See *American Pub. Co.* v. *Fisher,* 166 U. S. 464, 468.

Governor Stubbs of Kansas has recommended in his message to the State legislature an amendment of the law so that nine jurors out of twelve shall decide all civil cases. Judge Dillon, speaking of civil cases, deprecates "a change in the law whereby verdicts may be rendered by a less number than the whole of the jury — a change which I believe to be based upon no necessity and in the highest degree unwise." (Lectures on "Laws and Jurisprudence," etc., p. 132.) Doubtless in many cases litigants and perhaps an unbiased public express sore disappointment at a mistrial caused by a small minority of dissentients. But do they not likewise frequently and fiercely criticise verdicts that were returned by a unanimous jury? In a vast number of cases, especially in actions for negligence, courts have often said that "juries may not legally guess the money or property of one litigant to another." *Midland Valley R. Co.* v. *Fulgham,* (C. C. A.) 181 Fed. Rep. 91, 95, *per* Sanborn, J. Is there no just ground for imputing an element of guesswork to a nine to three verdict? Again, *testes ponderantur non numerantur* is a familiar maxim. Now, just as three witnesses may, and frequently do, overcome nine, so may the judgments of three jurors manifestly command superior confidence, compared with the opinions of nine.

Rationale of Unanimous Verdict Requirement in Criminal Cases.

Commenting on the amendment to the California Constitution, above noticed, the Los Angeles *Examiner* declares that the proposed change agrees with the common sense of the people, and then proceeds as follows:

"For more than thirty years we have had verdicts in civil cases in the State settled by a three-fourths vote of the jury, and not the most captious advocate has complained that any injustice has been done to public or private interests by the innovation. There can be no reasonable doubt that similar success will follow the application of the same rule to criminal cases.

"When any matter is decided in this country by a vote of three to one, nobody thinks of questioning it. A decision so overwhelming is taken to settle the matter beyond dispute. It is even more conclusive when the decision is reached by men who have heard a statement, under the most solemn forms of law, of all the facts in the matter, and have listened to all the arguments that can be founded on those facts made by men trained in the principles of our laws.

"After all, justice, like everything else in life, must be a practical matter. And, as a plain working principle, the thing that is proved to the satisfaction of three out of four men is sufficient for practical purposes.

"The amendment is one that will put an end to the 'hung jury' and help to secure substantial justice. It will be seen that it is not proposed to do anything irrevocable. To take away a man's life will require a unanimous verdict. If a mistake is made in other cases it can be corrected by executive pardon."

A judicial system for the trial of criminal cases which avowedly depends for its justification upon the opportunity to obtain justice by application to the executive is not in our opinion a desirable acquisition. In the next place a defendant in a criminal case is under a disadvantage which does not handicap a defendant in a civil suit. It is well understood that a person on trial for crime could not be in that situation unless there was some evidence or supposed evidence against him. So there is something of a burden upon him at the very outset, notwithstanding the theoretical presumption of innocence. If he is prosecuted by information, and the public prosecutor has the reputation of being a careful and judicious officer who almost invariably secures convictions, it may be extremely difficult for jurors to set aside their prepossessions against the accused. If he is prosecuted by indictment, for like reasons the presumption of innocence will be deprived of much of its legitimate weight — declared legitimate in some jurisdictions, at least. Since the defendant in a criminal case contends against greater odds than the defendant in a civil case, it seems to us unfair that the task imposed upon his adversary should be abated to the same extent as in civil cases.

The rationale of the rule requiring proof of guilt beyond a reasonable doubt in order to justify a conviction in a criminal case is peculiarly relevant here, and was well stated by Judge Sanborn in *U. S.* v. *Shapleigh,* (C. C. A.) 54 Fed. Rep. 126, 129:

"The presumption that every man is innocent until the contrary appears, and a consideration of the irreparable injury to the defendant that must result from an unjust conviction,

tended to the establishment of this rule; but doubtless the controlling consideration was the inequality of the parties in power, situation, and advantage in criminal cases where the government, with its unlimited resources, trained detectives, willing officers, and counsel learned in the law stood arrayed against a single defendant, unfamiliar with the practice of the courts, unacquainted with their officers or attorneys, often without means, and frequently too terrified to make a defense if he had one, while his character and his life, liberty, or property rested upon the result of the trial. Proof sufficient to satisfy beyond a reasonable doubt, then, is required in a criminal case, because its purpose is punishment, not compensation for injury; its prosecutor is the State; the result to the defendant of its successful prosecution is irreparable loss of character, and the loss of either life, liberty, or property; and because the presumption is that every man is innocent until the contrary appears; while less convincing evidence will authorize a recovery in a civil suit, because its purpose is generally compensation for injury or the determination of rights, not the punishment of the offender; the litigants are generally private parties, more nearly equal in resources, advantages, and situation, and neither the character, life, nor liberty of either is ordinarily at stake."

"Capital Punishment Day."

A BILL for the abolition of capital punishment comes up with such regularity at every session of the Massachusetts legislature that two newspapers in the vicinity of Boston, apparently without concert, spoke of last February 7 as "capital punishment day" at the State House, that being the day when the House of Representatives by a vote of 89 to 31 and 90 to 28 respectively rejected a bill giving a jury the right to fix the penalty for murder in the first degree, and another providing that the punishment shall be life imprisonment. The Nebraska legislature has also refused to disturb the capital punishment statute.

Staying Execution Pending Bill to Abolish Capital Punishment.

ON the last day of February the Minnesota House of Representatives, by a vote of 95 to 15, passed a bill abolishing the death penalty, and at this writing (March 3) the bill is before the Senate. Meanwhile the grand jury in the county where an aged man is under sentence of death for poisoning his two stepchildren has demanded that the governor set a date for the hanging; but he refuses to do so, declaring that he awaits the action of the Senate on the pending bill, which he intends to sign if the legislature passes it, and will then commit the condemned man to the penitentiary for life. Whatever may be the governor's personal opinion of the wisdom of abolishing capital punishment, it seems to us that he could not reasonably do otherwise than await the action of the legislature, and that if the death penalty shall be abolished the governor should regard it as retroactive. If he were to send the man to the scaffold without a clear expression of intention by the legislature that its favorable action on the pending bill shall have only prospective operation, he would subject his memory to the obloquy from which an eminent historian deemed it necessary to rescue the reputation of one of the greatest of England's chief justices.

Prior to an Act of Parliament of 1696 regulating trials for high treason a defendant in such cases was not entitled to a copy of the indictment. Furthermore, except when some question of law incidentally arose during the trial, his counsel's mouth was closed, and he could do no more than look on as a mere spectator. Campbell's Lives of the Chief Justices (Cockcroft's ed.), vol. 3, p. 139. On March 11, 1696, Robert Charnock, Edward King, and Thomas Keyes were put on trial at the Old Bailey, Lord Chief Justice Holt presiding, for high treason in conspiring to murder King William. 12 How. St. Tr. 1377. We now quote from Macaulay's History of England:

"It was the eleventh of March. The new Act which regulated the procedure in cases of high treason was not to come into force till the twenty-fifth. The culprits urged that as the legislature had, by passing that Act, recognized the justice of allowing them to see their indictment, and to avail themselves of the assistance of an advocate, the tribunal ought either to grant them what the highest authority had declared to be a reasonable indulgence, or to defer the trial for a fortnight. The judges, however, would consent to no delay. They have therefore been accused by later writers of using the mere letter of the law in order to destroy men who, if that law had been construed according to its spirit, might have had some chance of escape. This accusation is unjust. The judges undoubtedly carried the real intention of the legislature into effect; and for whatever injustice was committed, the legislature, and not the judges, ought to be held accountable. The words 'twenty-fifth of March' had not slipped into the Act by mere inadvertence. All parties in Parliament had long been agreed as to the principle of the new regulations. The only matter about which there was any dispute was the time at which those regulations should take effect. After debates extending through several sessions, after repeated divisions with various results, a compromise had been made; and it was surely not for the courts to alter the terms of that compromise. It may indeed be confidently affirmed that, if the Houses had foreseen the Assassination Plot, they would have fixed, not an earlier, but a later day for the commencement of the new system. Undoubtedly the Parliament, and especially the Whig party, deserved serious blame. For, if the old rules of procedure gave no unfair advantage to the Crown, there was no reason for altering them; and if, as was generally admitted, they did give an unfair advantage to the Crown, and that against a defendant on trial for his life, they ought not to have been suffered to continue in force a single day. But no blame is due to the tribunals for not acting in direct opposition both to the letter and to the spirit of the law. The government might indeed have postponed the trials till the new Act came into force; and it would have been wise, as well as right, to do so; for the prisoners would have gained nothing by the delay. The case against them was one on which all the ingenuity of the Inns of Court could have made no impression."

In Connecticut, about twenty years ago, a capital sentence for murder was commuted to life imprisonment by special act of the General Assembly. Governor Morgan G. Bulkeley vetoed the act; the man's friends were unable to obtain a majority vote to overcome the veto — a bare majority suffices in Connecticut — and he was hanged. For divers reasons, if our memory serves us, Governor Bulkeley was not reproached for his veto. But under ordinary circumstances we should suppose it would have been regarded as a shocking exercise of power.

Memorial Addresses for Departed Lawyers.

IN the preface to Simmons's excellent Wisconsin Digest, published in 1910, the author says: "Under the heading 'Judges and Lawyers' will be found references to the memorials to departed jurists and lawyers, as presented in the Supreme Court and recorded in the official reports, from the organization of that court. This is an entirely new feature, and it is hoped may prove useful and find appreciation among the bar of the State." We hope Mr. Simmons's example will be followed by all other digesters. The universal neglect to notice the tributes to departed brethren, after they have been printed as per-

petual memorials in appendixes of the official reports, has often struck us as a shameful omission. Indeed, we thought at one time of publishing indexed lists of these obituary contributions for each State, running them in as many numbers of this magazine as were necessary. Not infrequently, perhaps, the discourse of a talented lawyer lamenting the loss of a distinguished associate is well worth reading again and again as a superb literary production. In one such address now before us the speaker referred to the infelicity which attends the reputation of a great lawyer, the world accepting his work, but forgetting the worker, and then proceeded as follows: "The cheap caricatures of Dickens on the profession will outlive, I fear, in the popular memory, the judgments of Chief Justice Marshall, for the latter were not clownish burlesques, but only masterpieces of reason and jurisprudence. The victory gained by the counsel of the Seven Bishops was worth infinitely more to the people of England than all the triumphs of the Crimean war. But one Lord Cardigan led a foolishly brilliant charge against a Russian battery at Balaklava, and became immortal. Who led the great charge of the seven great confessors of the English church against the English crown at Westminster Hall? You must go to your books to answer. They were not on horseback. They wore gowns instead of epaulettes. The truth is, we are like the little insects that in the unseen depths of the ocean lay the coral foundations of uprising islands. In the end come the solid land, the olive and the vine, the habitations of man, the arts and industries of life, the havens of the sea and ships riding at anchor. But the busy toilers which laid the beams of a continent in a dreary waste are entombed in their work and forgotten in their tombs."

Commander Peary Thanked by Congress, and Now Rear-Admiral.

March 3, Commander Robert E. Peary received his long-deferred reward. By a vote of 154 to 31 the House of Representatives passed a Senate bill retiring him with the rank and pay of a rear-admiral, and extending to him the thanks of Congress, which carries with it the privileges of the Senate and House chambers. Very few persons have received the latter honor since the foundation of the government; and it is said that only twenty-six men have ever been formally thanked by Congress. Announcement of the vote on the Peary bill was received with cheers.

A famous set of English reports, which comparatively few lawyers have ever read, contains an account of thanks extended by vote of the House of Commons to a distinguished man whose merit, unlike that of our Peary, had to pierce a sombre cloud of dishonor. In 30 Howell's State Trials, 226–959, is an account of the proceedings on an indictment of Sir Thomas Picton for a misdemeanor in causing the torture to be inflicted upon Luisa Calderon, a free mulatto, in the island of Trinidad when the defendant was governor and commander in chief in the island. The indictment was found in 1804, but the case dragged along until 1812. The jury rendered a special verdict which was duly argued in 1810, but no opinion or judgment thereon was ever delivered, although it was thought at the bar that the judgment would have been against the defendant, and that he would have been inadequately punished. From a note at the end of the case in the report we extract the following: In 1809 General Picton was appointed to the command of a brigade at the attack upon the island of Walcheren. In 1810 he held a similar command under Sir Arthur Wellesley in Portugal, and afterward commanded a division which made a conspicuous figure during the whole of the Peninsular war. In 1813 he was elected to Parliament as member for the borough of Pembroke, and in November of the same year he received the unanimous thanks of the House of Commons for his military services. He immediately afterwards rejoined the army of Spain, and commanded, at the battles of Orthez and Toulouse, the same division which he had so often before led to victory. On June 24, 1814, he again received the thanks of the House of Commons. He was killed at the battle of Waterloo, where he held the rank of lieutenant-general, "gloriously leading his division to a charge with bayonets"—a lieutenant-general leading a bayonet charge!—"by which one of the most serious attacks made by the enemy upon our position was defeated," in the language of the Duke of Wellington's dispatch announcing the victory of Waterloo. A monument to his memory was erected in the cathedral of St. Paul's by unanimous vote of the House of Commons. On the first vote of thanks the Speaker of the House of Commons addressed the general as follows:

"Lieutenant-General Sir Thomas Picton: In this House your name has been long since enrolled amongst those who have obtained the gratitude of their country for distinguished military services; and we, this day, rejoice to see you amongst us, claiming again the tribute of our thanks for fresh exploits and achievements. Wherever the history of the Peninsular war shall be related, your name will be found amongst the foremost in that race of glory; by your sword the British troops were led on to the victorious assault of Ciudad Rodrigo; by your daring hand the British standard was planted upon the castle of Badajoz; when the usurper of the Spanish throne was driven to make his last stand at Vittoria, your battalions filled the centre of that formidable line, before which the veteran troops of France fled in terror and dismay; and by your skill, prudence, and valor, exerted in a critical hour, the enemy was foiled in his desperate attempt to break through the barrier of the Pyrenees, and raise the blockade of Pamplona. For the deeds of Vittoria and the Pyrenees, this double harvest of glory in one year, the House of Commons has resolved again to give you the tribute of its thanks; and I do therefore, now, in the name and by the command of the Commons of the United Kingdom of Great Britain and Ireland in Parliament assembled, deliver to you their unanimous thanks for your great exertions upon the 21st of June last near Vittoria, when the French army was completely defeated by the allied forces under the Marquis of Wellington's command. And also for the valor, steadiness, and exertion, so successfully displayed by you in repelling the repeated attacks made on the position of the allied army by the whole French forces under the command of Marshal Soult between the 25th July and 1st of August last."

A speech in similar terms accompanied the second vote. It was natural that the general should be personally addressed, since he was a member of the House of Commons himself. Had Commander Peary been a member of Congress, or perhaps if he had been thanked for military exploits, we presume the thanks would have been delivered to him orally by Speaker Cannon.

Official Weather Forecaster Defines and Delimits Dawn.

In a divorce case tried last month before Mr. Justice Brady and a jury in the New York Supreme Court, a witness testified to what she saw when looking into a room at 6.30 A. M. on Jan. 26, 1910. She had said it was then dawn, but the defense attempted to prove that it was

too dark to see anything at that hour. Weather Forecaster James H. Scarr was called to describe the conditions at that hour of the date in question, and he had with him a big batch of records. When he took the stand the court facetiously remarked, perhaps with *sotto voce* seriousness, that it was to be hoped that the records were of the actual weather and not of the forecasts. Mr. Scarr testified that "dawn is the period when the first traces of light appear," and that in January dawn exists for an hour before the sun rises. On the day in question the sun rose at 7.10 A. M. In *Fanning* v. *Fanning,* 2 N. Y. Misc. 90, 20 N. Y. Supp. 849, Mr. Justice Prior reversed a decree of divorce as unsupported by credible evidence, where it was based largely upon testimony of a woman to very minute observations of a man and another woman out of doors in the evening of Decoration Day. The witness had asserted, for example, that the man's waistcoat was unbuttoned with the exception of exactly three buttons. The books teem with all sorts of cases where courts have discussed the weight of testimony to events or conditions claimed to have been observed in the nighttime.

Degree of Light Near Dawn Judicially Determined.

THERE are numerous cases in the reports, most of them admiralty cases arising out of collisions on the water, where courts have found it necessary to estimate the degree of light existing before sunrise or after sunset. In *Cohen* v. *The Brig Mary T. Wilder,* Taney (U. S.) 567, 6 Fed. Cas. No. 2,965, Chief Justice Taney said that in the interval between the going down of the moon at an hour and a half before sunrise, and broad daylight, it may be very dark; "certainly the mere dawn of the day would not immediately dissipate the darkness which followed the going down of the moon." In *Train* v. *The North America,* 23 Fed. Cas. No. 13,853, a case of a collision off the Battery, at New York, at four o'clock in the morning of March 30, Judge Betts held it to be culpable negligence for a vessel to be lying at anchor without a light. In the *City of Troy,* 9 Ben. (U. S.) 466, 5 Fed. Cas. No. 2,769, Judge Benedict held that on a clear July morning, when the dawn was already breaking, it could not have been so dark that a barge with a light at her bow and in tow of a tug would not be plainly visible to a vessel which observed the tug and succeeded in clearing her by an ample margin, if the vessel's lookout had been alert. In *Fletcher* v. *The Cubana,* 9 Fed. Cas. No. 4,863, where a collision occurred at about four or half-past four A. M. on June 19th, in latitude 25° 48′ N., longitude 62° 18′ W., the pivotal question was whether or not it was dark at the time. The witnesses on one vessel insisted that it was not, while those on the other asserted the contrary. Two witnesses from New York were called, who testified that they were acquainted with the navigation of the ocean in the vicinity of the place of collision, and they stated that at that time of the year it must have been broad daylight when the vessels collided. "The court has had some hesitation in accepting this statement," said Judge Shipman, "as it is in conflict with the commonly received opinion of geographers and navigators touching the length of time which dawn precedes the morning and twilight follows the setting sun. But as the testimony is positive, and the witnesses say they have personally witnessed the state of the atmosphere in that region and at that season of the year and time of day, the court must accept their testimony as confirming that of those on board the schooner," who affirmed the same fact.

Aberrations of Color Sense in Witness.

IN a lecture at Boston, March 4, before the Society of Arts, Prof. Edmund Beecher Wilson of the department of biology at Columbia University declared that eight times as many men are color blind as women, and that a man may inherit color blindness from one of his parents, but it takes two to transmit it to a daughter. The New International Encyclopædia says color blindness is found in from three to four per cent. of men and less than one per cent. of women. "The most common forms of color blindness are red blindness, green blindness, and red-green blindness." A variety of defects of vision, in respect of the color sense, apparently afflicted many witnesses in *Tillson* v. *Maine Cent. R. Co.,* 102 Me. 463, 67 Atl. Rep. 407, and it is rather remarkable that none of them seems to have been subjected to the infallible tests now in vogue with the New York Central and some other great railroad companies. In the case cited a semaphore with convex lenses on its four sides, red glass on two opposite sides and green glass on the other two opposite sides, was set near a railroad track and for more than a score of years, as far as known, had faithfully performed its office of sending red rays, *and only red rays,* directly down the track as a signal of danger when it was set for the red. On the night of an accident when the plaintiff, a fireman on defendant's train, was injured by reason of the engineer running past the semaphore, it was conceded, and even alleged in the plaintiff's declaration, that the device was properly set for danger, but it was averred that the device was so negligently located that at some points in front of it the green light was shown, or both red and green. But the singular fact was that ten witnesses for the plaintiff had tested the contrivance since the accident, and six of them swore that the light when set for red showed such a mixture of red and green that it was not practicable to distinguish the signal intended, while four of them declared that it displayed clear green. Several of these witnesses were experienced engineers. Fifteen witnesses for the defendant, having made similar tests, declared that when the apparatus was set for red, nothing but red was visible down the track. The court did not attempt to reconcile this conflict in testimony, but simply applied the familiar "physical facts" rule as follows:

"Whatever variations there may appear to be in the testimony of witnesses who saw the same light set at the same angle and shedding its light under the same conditions, there are immutable laws of physical science that cannot be disturbed by human testimony. Light, from whatever source emanating, must always traverse unobstructed space in direct lines, and, according to familiar principles in optics, rays of light falling upon a convex lens are conveyed into a narrow and intense beam. In this case the evidence is unquestioned that the rays of light emitted through the double convex lens of the semaphore lantern were so converged that the angle of refraction was less than fifteen degrees from a parallel line; whereas, without this lens, the rays would have been dispersed at an angle of about sixty degrees. Hence it would be impossible that the same light, adjusted at the same angle, should exhibit clear red to one observer, clear green to another, and a mixture of red and green to a third, under precisely the same conditions. Testimony given in direct contravention of physical laws is necessarily deemed incredible."

PROPOSED ANTE-MORTEM PROBATE OF WILLS.

A NOVEL and distinctly "progressive" measure is one which is now pending in the Massachusetts legislature and which provides for the ante-mortem proof of wills. The idea originated with the author of the bill, Hon. Albert E. Pillsbury, of Boston, attorney-general of the State in 1891–1894. The present legislature has held the bill in abeyance and referred it to the next session of that body. Meanwhile it is attracting widespread attention and comment, and a bill in similar or identical terms has been introduced in the New York legislature, and, if we are correctly informed, in some other State legislatures. The entire text of the bill, as it now reads, is as follows:

"Any will or codicil may, at the option of the testator, be offered for proof and proved in his lifetime, in the same manner and under the same conditions provided by law in the case of the will of a deceased testator, except that no appeal shall lie from the decree of the Probate Court thereon. The attestation of witnesses shall not be essential to the validity of any will or codicil so offered for proof. Upon the death of the testator a will or codicil so proved, if not then revoked in accordance with law, shall take full effect as his last will or codicil without further proceedings, and its validity as such shall not thereafter be drawn in question in or by any other proceeding."

The leading purpose is to enable testators to live and die without apprehension that any greedy and unscrupulous heirs will attack the will, or extort money from beneficiaries by threats to do so, on the alleged ground of mental incapacity or undue influence. To the legislative committee Mr. Pillsbury said, among other things:

"The looting of dead men's estates has now become an established industry in Massachusetts, as it has been in New York for many years. A will bequeathing any substantial sum of money to charities, or to any person or object outside the testator's family and near relatives, is always liable to be contested. . . . The chances are, at the best, that a substantial part of the estate may be wasted in defending the will or buying off claimants, and if the estate is large and the testator had any sign of eccentricity about him, or any peculiarity of temperament or conduct that can be tortured by easy consciences into evidence of insanity, there is always a chance if not a probability that his will must give way to a new and radically different disposition of his estate, arranged by or between claimants, lawyers, judges, and jurors according to their own interests or ideas of propriety."

Undoubtedly something ought to be done, if possible, to prevent these predatory will contests.

For statistical information we have examined all the cases of will contests on the ground of testamentary incapacity or undue influence that are reported in the twenty-five volumes immediately preceding and including volume 65 of the Northeastern Reporter, these volumes covering the courts of last resort in Illinois, Indiana, Massachusetts, New York, Ohio, and the Indiana Appellate Court, for the years 1898–1902. There were 38 cases. This is not an alarming number, but there was probably a considerable number of unreported cases carried no farther than the Probate Court or settled without contest proceedings. In all or nearly all of the 38 cases there had been a jury trial. Verdicts sustaining the will were affirmed in 16 cases (4 of them in Massachusetts), and reversed, but solely for erroneous rulings, in 1 case. Verdicts against the will were affirmed in 7 cases (1 of them in Massachusetts), reversed for erroneous rulings in 9 cases and as against the weight of evidence in 5 cases. This last item of five cases where juries set aside wills on evidence that did not convince the judges of the appellate court goes far to justify the provision in the Massachusetts bill which cuts off appeals and precludes a trial by jury. We confess we had supposed that the almost universal statutory provision for a jury trial on appeals in contested will cases in this country was based on better-founded confidence that juries are "safe and sane" in such cases.

But in *Means* v. *Means*, (1850) 5 Strobh. (S. Car.) 167, 189, we find Judge Wardlaw speaking as follows: "This tendency of juries to usurp legislative power arises from prejudices general in the community, and in nothing has it been more strongly exhibited to the view of the court than in setting aside such wills of old persons as have defeated the seemingly just claims of some worthy expectants. . . . For a jury to decide against a will because they do not like its provisions is a fraud upon the law, a violation of their sworn duty, and an usurpation which would never be tolerated if it were not concealed." And in *Smith* v. *Harrison*, (1871) 2 Heisk. (Tenn.) 246, Judge Sneed said: "There is among juries of the present day, and especially in this State, a mischievous proclivity to set aside wills on the slightest grounds, if there be a semblance of inequality in the testamentary dispositions." In *In re Journay's Will*, 44 N. Y. Supp. 548, 15 N. Y. App. Div. 567, the three attesting witnesses to a will were experts in insanity who had examined the testator at his request for the very purpose of repelling an unfounded attack that he feared would be made upon his testamentary capacity. Mr. Justice Bartlett said: "Such a precaution is certainly unusual, but now that so many wills are contested upon insufficient grounds, it can hardly be characterized as either unnatural or unwise."

On the subject of their wills most men are studiously secret or do not speak candidly and consistently, and it is very questionable whether many testators would be willing to expose their testamentary dispositions to the scrutiny of jealous and quarrelsome relatives or the impertinent curiosity of others, an unavoidable necessity under the proposed statute.

The Massachusetts bill provides that the validity of a will admitted to *ante-mortem* probate "shall not thereafter be drawn in question in or by any other proceeding." Is the wisdom of that provision indisputable? In Massachusetts, in accordance with the prevailing doctrine in other states, "a decree of the Probate Court, admitting to probate a will, is final and conclusive upon all the world until revoked by the court by which it was passed. . . . It cannot be reversed by writ of error or certiorari, and it cannot be set aside in equity for fraud." *Wolcott* v. *Wolcott*, 140 Mass. 194, *per* Morton, C. J. As there is to be no appeal from a decree allowing *ante-mortem* probate, an aggrieved party will have no remedy whatever in a case where the decree is obtained by fraud or collusion, if the phrase "any other proceeding" in the proposed act includes a proceeding in the court where the will is probated. On the other hand, if by construction that court is not meant to be included, the sole remedy would be an application to vacate the probate. *Waters* v. *Stickney*, 12 Allen (Mass.) 1.

Now, as Mr. Pillsbury says, referring to present conditions, "there are, of course, some cases of merit, where there are real grounds of contest." Is it clear that these meritorious cases would be sure of receiving all the consideration they deserve in the Probate Court, when by collusion or bargaining with some of the heirs or by reason

of the indifference or impecunious condition of nonresident heirs, crafty persons may secure an *ex parte* probate? Would it be impossible to impose upon the judge of probate when evidence that would give him pause is suppressed or undisclosed by those offering the will for probate?

In *Marsh* v. *Tyrrell,* 2 Hag. 84, 4 Eng. Eccl. 33, the will of a married woman was attested by three witnesses, one of them a solicitor, another a surgeon, the third a physician. "Certainly, three persons, respectable in situation, of unimpeached general character, and competent to arrive at a fair opinion," said Sir John Nicholl, "as far as their opportunities and the means they used of judging enabled them to form an estimate of her mental capacity. There is no reason whatever to suppose that they would either enter into a fraudulent conspiracy with the husband to obtain this will, or that they would have come forward to support it by wilful perjury; nothing of the sort can possibly be imputed to them." Both the surgeon and the physician — the latter "particularly conversant with defects of the mind, at least in cases of derangement" — had visited and examined the testatrix for the very purpose of satisfying themselves of her mental condition. All testified in support of the will. But in a masterly opinion Sir John Nicholl set aside the will on the ground that the testatrix "was a mere instrument and puppet in the hands of her husband" and, moreover, of doubtful capacity. It is very probable that if the testator whose will almost ignoring his only child, a daughter, was declared invalid by the same great magistrate in the leading case of *Dew* v. *Clark,* 3 Addams 79, 2 Eng. Eccl. 436, had appeared before a court in support of an *ex parte* application for *antemortem* probate of the will, he would have succeeded in concealing the terrible delusion that lurked in his mind. If highly intelligent attesting witnesses who thought they were on their guard, and a judge of remarkable sagacity, could thus be deceived, it suggests that the Massachusetts bill should not be passed without the most careful consideration of the provision denying a right of appeal. It is hard to conceive of a frivolous appeal against a living testator and at the risk of a substantial bill of costs.

In *Marsh* v. *Tyrrell,* above cited, the court remarked that the attesting witnesses "may have been imposed upon and duped by the artful misrepresentations of the husband; they may have suffered their vigilance to be lulled, and their penetration to have slept, and after having embarked in the transaction, and after their characters were in some measure implicated, they may be under a strong bias to support and give effect to the act." Likewise a judge of probate, being human, might not consider with impartiality an application asking that he vacate his own decree admitting a will to probate, and thereby confess that his discernment was superficial.

CHARLES C. MOORE.

"A COMMISSION to visit hospitals, and liberate all those who, at their visit, talked and acted like other men, would empty them of half their inhabitants." *Per* Mr. Justice Breese in *Van Horn* v. *Keenan,* 28 Ill. 445, 451.

ONE cannot look too closely at and weigh in too golden scales the acts of men hot in their political excitement. Hawkins, J., *Ex parte Castioni,* (1890) 60 L. J. Rep. (N. S.) Mag. Cas. 33.

COMMON-SENSELESS JURY TO HEAR EXPERT TESTIMONY.

ON the recent trial of Robin, the banker accused of criminal transactions in "high finance," there was great difficulty in getting a satisfactory jury. The following is a newspaper report of the examination of a talesman, Mr. Benjamin Englander, by the defendant's eminent counsel:

"Have you any prejudice against insanity as a defense?"

"No."

"Would you take the word of experts on insanity — would you accept the opinions of men who had devoted their lives to the study of the subject?"

"Oh, I'd listen to them," said Mr. Englander.

"I know that," said counsel, rather testily; "the court would make you do that. But would you set up your judgment against theirs?"

"I'd believe them when I thought they told the truth," was the reply.

"Would you accept their word as having a scientific value beyond that of the layman?"

"I'd listen to them, and then I'd weigh their evidence, judging its value by the standard of my own common sense," said Mr. Englander.

Counsel jumped up and snapped out:

"I challenge this man on the ground of his own mental incompetency."

Justice Seabury declined to accept this challenge.

"But the man doesn't answer my questions properly," protested counsel.

"Challenge for cause denied," said the court.

A New York juror has nothing to do with insanity as a defense in criminal cases except to determine whether it be such defect of reason as is specifically described in section 21 of the Penal Code. The questions to the juror did not comprehend that description and were therefore necessarily ineffective. But waiving that point, let us examine counsel's startling declaration of the juror's mental incompetency. Perhaps our comments will be regarded as purely academic, on the ground that "it is a matter of common occurrence for counsel to bring forward arguments and lay down propositions in which they have no faith, or but very little," as Mr. Justice Marcus remarked in *In re Law,* 124 N. Y. Supp. 1050. But the episode above noted has been mentioned here and there in the press, and the position of counsel occasionally indorsed.

Common sense was happily termed by the late Richard Grant White "the unwritten law of reason." The proposition to banish it from the jury box in criminal cases, even where the testimony of alienists is uncontradicted by other alienists, cannot find a scintilla of support in any reported case. Nor has such testimony ever been regarded as conclusive in a civil case where the competency or responsibility of a person was in dispute and evidence of his conduct was before the court. If it were binding upon the jury in behalf of a defendant in a criminal case, it would bind the jury in behalf of the prosecution. If it is controlling on either side in a criminal case, *a fortiori* must it have the like efficacy in a civil case; and probate of a will must be granted or denied in strict obedience to the concurrent opinions of experts in mental disease. Any one can see that this would be intolerable.

In McClure's Magazine for September, 1907, Professor Hugo Münsterberg declared that in weighing human testimony "the primitive psychology of common sense" is "out of order" in the court room, and he insisted that judges and juries should be guided by the advice of "the

psychological expert." And in LAW NOTES for November, 1907, he argued that the courts ought to employ psychologists just as, "if there is a brain disease, they call an alienist." There you have it. How much patience would Robin's brilliant counsel exhibit if the famous Harvard expert insisted that he be restrained from addressing the jury on the facts in any case and that the expert be their supreme adviser? But the professor's demand would be every whit as reasonable as that made in behalf of the alienists in the Robin case.

"These medical experts are no better qualified to draw correct inferences from every-day transactions and non-scientific premises than is the ordinary man of average common sense," said Chief Justice McSherry in a contested will case, *Berry* v. *Safe Deposit, etc., Co.*, 96 Md. 45, 53 Atl. Rep. 720.

In another will case the sagacious Judge Breese of Illinois said the medical experts "may be able to state the diagnosis of the disease more learnedly, but upon the question whether it had, at a given time, reached such a stage that the subject of it was incapable of making a contract, or irresponsible for his acts, the opinion of his neighbors, if men of good common sense, would be worth more than that of all the experts in the country." *Rutherford* v. *Morris*, 77 Ill. 397.

Was not the Late Judge Lewis B. Woodruff (born and died in Litchfield, Conn.) of the Federal Circuit Court for the Southern District of New York notoriously sound on questions of fact? Well, in *Gay* v. *Union Mut. L. Ins. Co.*, 9 Blatchf. (U. S.) 142, 10 Fed. Cas. No. 5,282, Judge Woodruff and a jury in an action on an insurance policy had before them the question whether the insured, when he committed suicide, was "insane, incapable of distinguishing between right and wrong, and unconscious of the nature and consequences of the act he was committing." There was much expert testimony on the question, and in his instructions general rules for determining its value were stated by the judge in the easy style of a master mind. "But, after all," he concluded, "the question of fact in issue is not for the expert to decide. The question of fact in this case is neither for the expert nor for the court. It is for you to decide, upon your sound judgment under the oaths which you have taken, to render a verdict according to the whole of the evidence submitted to you for consideration."

Was not Judge Lumpkin of Georgia a magistrate of exceptional good sense? In *Choice* v. *State*, 31 Ga. 424, 466, a conviction of murder was affirmed despite the plea of insanity. In the course of his opinion Judge Lumpkin said: "As for myself, I would rely as implicitly upon the opinion of practical men, who form their belief from their observation of the appearance, conduct, and conversation of a person, as I would upon the opinions of physicians, who testify from facts proven by others, or the opinions even of the keepers of insane asylums."

Was not he the keeper of an insane asylum who testified for Harry Thaw on his last trial and, having stated that he had testified as an expert in numerous cases, was handled so severely on cross-examination by the distinguished District Attorney, that the latter concluded by putting the question, with well-founded significance, "Do you expect ever to testify again as an expert?" Did not the District Attorney intend and expect that the jury should listen to that cross-examination *with their common-sense?*

In *People* v. *Faber*, 199 N. Y. 256, 267, 92 N. E. Rep. 674, 678, a murder case, Judge Chase said: "The jury are undoubtedly entitled to the facts on which an insanity expert bases his opinion, if the same are sought by the prosecution or the defendant." Why present these data to the jury if the naked opinion of the expert peremptorily demands belief? In *Carroll* v. *Home Ins. Co.*, 64 N. Y. Supp. 522, the Appellate Division held that the testimony of a fire insurance agent of lifelong experience that the hazard would be increased by use of premises as a saloon which had been insured as a dwelling, was properly excluded, because it was a question upon which one intelligent mind could form as good a judgment as another in a given case. "If this case is one in which an expert in insurance matters knows or can know more than the ordinary man of intelligence as to the hazard or danger from fire being increased or diminished by the manner of occupation," said the court, "then the opinion of the expert is or may be helpful to the ordinary mind, and is admissible, *though not controlling.*"

"A System of Legal Medicine," a valuable treatise well known to lawyers, consists of chapters contributed by fourteen experts. In the first chapter the expert says (italics ours):

"When wounds of the neck are present, their direction should be carefully observed, also their extent and number. Suicidal wounds made by a right-handed person run *from right to left,* while homicidal wounds take the opposite direction."

In another chapter in the same work a different expert's testimony is not so dogmatic (italics ours):

"The murderer cuts to kill, and is more apt to use greater force than he who seeks his own life, and the wound will give evidence of this event. Then also the cut is as often *from left to right* as vice versa and proof being adduced to show the deceased was right-handed, *would give suspicion* of murder rather than suicide."

Take your choice.

Twenty years ago, the late Lieutenant Totten, who was a professor at Yale and a profound student and expert Biblical investigator, told the public in a series of magazine articles that the end of the world was close at hand. The cocksureness with which this expert set a date, or a limit of time for it, surpassed even the late Ignatius Donnelly's faith in the Great Cryptogram. But information that he had announced connection between a date and an event seems not to have been conveyed to the source of power; for the date arrived on time, but the event is still on the way and its whereabouts unknown.

COMPENSATION TO WORKMEN SUFFERING FROM DISEASE.

ON the passing of the Workmen's Compensation Act 1897 (60 & 61 Vict., c. 37), there was a not unnatural tendency to consider that every "personal injury by accident" contemplated by that statute, and entitling the injured workman to compensation thereunder, must be something in the nature of an abrasion, cut, or rupture, a physical breaking or tearing — in short, a bodily wound of some kind. When, therefore, the House of Lords in *Brintons Limited* v. *Turvey*, 92 L. T. Rep. 578, (1905) A. C. 230, 2 Ann. Cas. 137 — the "anthrax case," as it is popularly styled — decided that even the contracting of a

disease by a workman as in that case, without any other form of personal injury, would justify a claim for compensation, it came somewhat as a surprise, disturbing, as it did, preconceived notions as to the intentions of the legislature. Workmen, however, have much to be grateful for because of that decision, inasmuch as it led to the insertion in the amending Act of 1906 (6 Edw. VII., c. 58) of a provision of the utmost importance to them. By section 8 the benefits conferred by that act are rendered applicable to any case in which a workman is suffering from a disease mentioned in the third schedule, and is thereby disabled from earning full wages at the work at which he was employed, or is suspended from his usual employment, on account of having contracted any such disease, or his death is caused by any such disease. It is necessary that the disease shall be due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, whether under one or more employers. In any such case, the workman, or his dependents, is to be entitled to compensation under the act as if the disease, or such suspension as aforesaid, were a personal injury by accident arising out of and in the course of that employment, subject to certain modifications. The diseases are designated in the headline to the section "Industrial Diseases," and the original group as specified in the third schedule to the act included anthrax as the first of them. The schedule has from time to time been expanded, further diseases having subsequently been added under an order of one of the secretaries of state, he being empowered to do so by the section.

Unenlightened by decisions of the courts on cases arising under the Act of 1906, most persons would probably feel disposed to imagine that no disease whatever not originally comprised in the schedule, or afterwards added thereto, would be deemed "personal injury by accident." To a large extent this is true, since it has been clearly laid down that, in order to bring a case within the purview of the act, the time, circumstances, and place in which an accident has occurred have to be indicated by means of some definite event. Manifestly, every disease contracted by workmen in the course of their employment cannot be regarded as constituting an "accident," according to the meaning of that word as given to it by the House of Lords in *Fenton* v. *Thorley and Co.*, 89 L. T. Rep. 314, (1903) A. C. 443. For, as was held by the Court of Appeal in the recent case of *Eke* v. *Hart-Dyke*, 103 L. T. Rep. 174, unless it is one of the scheduled diseases, a mere disease, unaccompanied by accident and not attributable to something which may be properly called an accident, does not entitle a workman — or his dependents in the event of his death — to compensation under the Act of 1906. It is essential that there should have been some specific accident to which the disease can be ascribed. Where the element of "accident" is wanting, there is nothing sufficient to bring the case within the principle of the decision of the House of Lords in *Brintons Limited* v. *Turvey, ubi sup.*

That decision of the ultimate tribunal, rather unexpected though it may have been, had the best of all reasons in support of it — that is to say, the finding of fact by the County Court judge. As was pointed out by the Master of the Rolls in giving his judgment in *Eke* v. *Hart-Dyke, ubi sup.*, the finding was that the disease — anthrax — of which the workman, who was employed in a wool-combing factory, eventually died, was due to the circumstance that at a particular time, and at a particular place, a bacillus alighted from the infected wool with which he was working, and impinged on a particular part of his body — namely, his eye — there being more than one part exposed to that particular mischief. The Court of Appeal, as likewise the House of Lords, accordingly held that it was an "accident," and that the workman had met with an accident which resulted in his death. But, continued the Master of the Rolls, "all the judges carefully abstained from lending color to the suggestion that a mere disease which you could not say was contracted at a particular time, and at a particular place, by a particular accident, was an accident which entitled a man to compensation."

The decision in *Brintons* v. *Turvey Limited, ubi sup.*, being what it was, the House of Lords could not do otherwise than give full effect to it in the later case of *Ismay, Imrie, and Co.* v. *Williamson*, 99 L. T. Rep. 595, (1908) A. C. 437 — the "heat stroke case." There a workman, who was employed in the stokehold of a steamship, suffered from heat stroke and fainted. He was brought up from the stokehold and taken at once to the place which was used as a hospital on the ship, and the usual remedies were applied; but he died within a couple of hours from exhaustion. Under these circumstances the House of Lords (Lord Macnaghten dissenting) held that the dependents of the workman were entitled to compensation. In effect, the heat stroke from the heat radiating from the furnace was treated as involving the same result as a sunstroke in the air. See as to that calamity *Morgan* v. *Owners of Steamship Zenaida*, 25 Times L. Rep. 446. All of those decisions were, however, considered to be distinguishable by the Court of Appeal when dealing with the facts in *Eke* v. *Hart-Dyke, ubi sup.* The learned judges preferred to take as their guide their own decision in *Broderick* v. *London County Council*, 99 L. T. Rep. 569, (1909) 2 K. B. 807. There a workman contracted the disease known as enteritis, while working in a sewer for his employers, from inhaling noxious gases. Enteritis is not one of the diseases included in the third schedule to the Act of 1906. The result of the enteritis was to accelerate long-existing heart disease from which the workman was suffering, incapacitating him for work before the time at which such heart disease would otherwise have incapacitated him. The Court of Appeal held that the contracting of enteritis in this manner was not a "personal injury by accident" within the meaning of the act, injury by disease alone, unaccompanied by an accident, not sufficing to bring a case thereunder. It could not be said when the disease was contracted, nor exactly where. It was due, no doubt, to sewer gas having got into the workman's system, but that was not considered sufficient to entitle him to compensation, on the simple ground that the element of "accident" was wanting in that case. Similarly, in *Eke* v. *Hart-Dyke, ubi sup.*, sewer gas was the *fons et origo mali*. The workman there met with his death by poisoning caused by sewer gas being inhaled or absorbed into his system. But the same reasoning which influenced the decision of the Court of Appeal in *Broderick's* case, *ubi sup.*, again came into play, and compensation was disallowed.

Diseases attributable to accidents being placed by the decisions of the courts on the same footing as those industrial diseases which, as expressly ordained by the legislature, entitle workmen to compensation, there could be no difficulty in holding that a disease actually consequent upon a specific physical accident was all the more within the ambit of the statute. In reference to such, a highly important principle was enunciated in the case of *Ystradowen Colliery Company Limited* v. *Griffiths*, 100 L. T. Rep. 869, (1909) 2 K. B. 533. It was decided in that case how the test is to be applied in determining whether a nonindustrial disease, contracted by a workman subsequent to personal injury to him by accident, is of such a nature that incapacity for work results from the injury.

A condition by no means unusual following close upon a physical accident is known to the medical profession as "traumatic neurasthenia" — that is to say, nervous debility, prostration, or exhaustion, resulting from the physical injury. Mus-

cular consequences of the injury to a limb, for instance, may have practically disappeared. But the injured person genuinely imagines that he is unable to use the limb. There is no dishonest shirking of work with any desire or intention to escape it — no shamming or malingering in the ordinary sense of those expressions. The workman may, in fact, have regained the physical state, so far as muscular power is concerned, in which he was before the accident occurred to him, and really be competent to perform the work in which he was then employed. He mistakenly and unreasonably believes, however, that he is incapable of working, because he had previously a disabled limb. This is precisely what happened in the case of *Eaves* v. *Blaenclydach Colliery Company Limited,* 100 L. T. Rep. 751, (1909) 2 K. B. 73. The workman there sustained a muscular injury to his leg through an accident. The Court of Appeal decided that his right to compensation did not cease so soon as he had recovered from the muscular consequences of the injury, but continued so long as the nervous effects — or the condition of traumatic neurasthenia — remained, resulting in his total or partial incapacity for work.

Traumatic neurasthenia apparently goes, also, by another name, that of "neuromimesis," or nervous mimicry. At any rate, it is a very similar disorder, it being the imitation in neurotic patients of organic disease. The patient veritably believes that he has the complaint which is imitated. It is described by doctors as a mixture of mimicry of disease and hysteria. Although a real and well-ascertained mental condition, it is supposed to be curable by an effort of will or by a counter shock. The condition is most commonly observed in persons of a nervous temperament who have suffered from some temporary injury accompanied by severe mental shock. The injury passes off in time; but meanwhile the mind has become accustomed to associate pain and disability with attempts to use the injured part, and this continues until something happens to prove to the patient's mind that the part is actually cured.

So far there was nothing very startling about the decisions that were pronounced in favor of workmen in relation to diseases contracted by them, even if not accepted, in all quarters, as exactly what might have been anticipated. Neither that of the House of Lords in *Brintons'* case, *ubi sup.,* nor in *Williamson's* case, *ubi sup.,* could be asserted to be without substantial foundation; while that of the Court of Appeal in *Eaves'* case, *ubi sup.,* is intelligible enough, and needs no defense when the grounds for it are carefully examined. But coming now to the more recent decision of the same court in *Yates* v. *South Kirkby, etc., Collieries Limited,* 103 L. T. Rep. 170, it is not to be wondered at if it provokes much criticism, for its soundness may well be challenged. It involves a remarkable extension of the doctrine established in *Eaves'* case, *ubi sup.,* to neurasthenia pure and simple. There was no traumatic neurasthenia or neuromimesis in that case, because the workman, although incapacitated from working, had not suffered any specific physical injury from an accident. He sustained a shock to his nervous system through the excitement and alarm occasioned to him by seeing the effects of an accident which had happened to a fellow workman. Owing to the shock, his nerves became so shattered that he could no longer follow his usual occupation. The condition of neurasthenia which supervened caused a genuine incapacity for work entitling him, in the opinion of the Court of Appeal, to compensation.

In the cases of *Victorian Railway Commissioners* v. *Coultas,* 58 L. T. Rep. 390, 13 App. Cas. 222, and *Dulieu* v. *White and Sons,* 85 L. T. Rep. 126, (1901) 2 K. B. 669, there was an elaborate discussion concerning the effects of a sudden terr unaccompanied by any perceptible physical injury, but occasioning a nervous or mental shock. Such an injury may, however, be directly traceable to the fright, and so may be caused by it. The mental suffering may, indeed, be such that actual bodily illness afterwards ensues. But it is quite another thing to say that the same amounts to "personal injury by accident" within the meaning of the Act of 1906. And the contention that the present decision stretches the meaning of the act beyond the limit of reason is not by any means baseless. We do not venture to claim to possess such prescience as would enable us to foretell, with any degree of certainty, what the House of Lords will determine should the point, in this or in some future similar case, come before them. The probability, however, is that there will be no unanimity of opinion on the part of the learned Lords. Nevertheless, the view entertained by the Court of Appeal will, as likely as not, be upheld by a majority of three to two, for that seems to be the recognized division in the House of Lords in workmen's compensation cases. — *The Law Times* (London).

THE LAW'S LUMBER ROOM.[1]

A PAIR OF PARRICIDES.

THERE is a new series of "State Trials" continuing the old, and edited with a skill and completeness altogether lacking in its predecessor; yet its formal correctness gives an impression of dullness. You think with regret of Howell's thirty-three huge volumes, that vast magazine of curiosities and horrors, of all that is best and worst in English history. How exciting life was long ago, to be sure, and how persistently it grows duller! What a price we pay for the smug comfort of our time! People shuddered of yore; did they yawn quite so often? Howell and the folk he edits knew how to tell a story. Judges, too, were not wont to exclude interesting detail for that it wasn't evidence, and the compilers did not end with a man's condemnation. They had too keen a sense of what was relished of the general: the last confession and dying speech, the exit on the scaffold or from the cart, are told with infinite gusto. What a terrible test earth's great unfortunates underwent! Sir Thomas More's delicate fencing with his judges, the exquisite courtesy therewith he bade them farewell, make but half the record; you must hear the strange gayety which flashed in the condemned cell and by the block ere you learn the man's true nature. And to know Raleigh you must see him at Winchester under the brutal insults of Coke: "Thou art a monster, thou hast an English face but a Spanish heart;" again, "I thou thee, thou traitor!" and at Palace Yard, Westminster, on that dreary October morning urging the sheriff to hurry, since he would not be thought fear-shaken when it was but the ague; for these are all-important episodes in the life of that richly dressed, stately, and gallant figure your fancy is wont to picture in his Elizabethan war-ship sweeping the Spanish Main. Time would fail to tell of Strafford and Charles and Laud and a hundred others, for the collection begins with Thomas à Becket in 1163 and comes down to Thistlewood in 1820. Once familiar with those close packed, badly printed pages, you find therein a deeper, a more subtle charm than cunningest romance can furnish forth. The account of Mary Stuart's ending has a finer hold than Froude's magnificent and highly decorated picture. Study at first hand "Bloody Jeffreys," his slogging of Titus Oates, with that unabashed rascal's replies during his trial for perjury; or again, my lord's brilliant though brutal cross-examination of Dunn in the "Lady" Alice Lisle case, during the famous or infamous Western Circuit, and you will find Macaulay's wealth of vituperative rhetoric, in comparison,

[1] By Francis Watt, London: John Lane.

tiresome and pointless verbiage. Also you will prefer to construct your own Braxfield from trials like those of Thomas Muir in 1793, and of Alexander Scott and Maurice Margarot in 1794, rather than accept the counterfeit presentment which Stevenson's master-hand has limned in "Weir of Hermiston."

But the interests are varied. How full of grotesque and curious horrors are the prosecutions for witchcraft! There is that one, for instance, in March, 1665, at Bury St. Edmunds before Sir Matthew Hale, with stories of bewitched children, and plague-stricken women, and satanic necromancy. Again, there is the diverting exposure of Richard Hathaway in 1702, and how the rogue pretended to vomit pins and abstain from meat or drink for quite miraculous periods. But most of those things I deal with elsewhere in this volume. The trials of obscurer criminals have their own charm. Where else do you find such Dutch pictures of long-vanished interiors or exteriors? You touch the *vie intime* of a past age; you see how kitchen and hall lived and talked, what master and man, mistress and maid, thought and felt; how they were dressed, what they ate, of what they gossiped. Again, how oft your page recalls the strange, mad, picturesque ways of old English law! *Benefit of clergy* meets you at every turn, the *peine fort et dure* is explained with horrible minuteness, the lore of *ship money* as well as of *impressment of seamen* is all there. Also is an occasional touch of farce. But what phase of man's life goes unrecorded in those musty old tomes?

Howell's collection only comes down to 1820. Reform has since then purged our law, and the whole set is packed off to the Lumber Room. In a year's current reports you may find the volumes quoted once or twice, but that is "but a bravery," as Lord Bacon would say, for their law is "a creed outworn." Yet the human interest of a story remains, however antiquated the setting, incapable of hurt from Act of Parliament. So, partly for themselves, partly as samples of the bulk, I here present in altered form two of these tragedies, a pair of parricides: one Scots of the seventeenth, the other English of the eighteenth century.

The first is the case of Philip Standsfield, tried at Edinburgh, in 1688, for the murder of his father, Sir James Standsfield, of New Mills, in East Lothian. To-day New Mills is called Amisfield; it lies on the south bank of the Tyne, a mile east of Haddington. There is a fine mansion-house about a century old in the midst of a well-wooded park, and all round are the superbly tilled Lothian fields, as *dulcia arva* as ever the Mantuan sang. Amisfield got its present name thus: Colonel Charteris, infamed (in the phrase of Arbuthnot's famous epitaph) for the "undeviating pravity of his manners" (hence lashed by Pope in many a stinging line), purchased it early in the last century and renamed it from the seat of his family in Nithsdale. Through him it passed by descent to the house of Wemyss, still its owners. Amongst its trees and its waters the place lies away from the beaten track and is now as charmingly peaceful a spot as you shall anywhere discover. Name gone and aspect changed, local tradition has but a vague memory of the two-centuries-old tragedy whereof it was the centre.

Sir James Standsfield, an Englishman by birth, had married a Scots lady and spent most of his life in Scotland. After the Restoration he had established a successful cloth factory at the place called New Mills, and there lived, a prosperous gentleman. But he had much domestic trouble chiefly from the conduct of his eldest son Philip, who, though well brought up, led a wild life. Whilst "this profligate youth" (so Wodrow, who tells the story, dubs him) was a student at the University of St. Andrews, curiosity or mischief led him to attend a conventicle where godly Mr. John Welch was holding forth. Using a chance loaf as a missile, he smote the astonished divine, who, failing to discover the culprit, was moved to prophecy. "There would be," he thundered, "more present at the death of him who did it, than were hearing him that day; and the multitude was not small." Graver matters than this freak stained the lad's later career. Serving abroad in the Scots regiment, he had been condemned to death at Treves, but had escaped by flight. Certain notorious villainies had also made him familiar with the interior of the Marshalsea and the prisons of Brussels, Antwerp, and Orleans. Sir James at last was moved to disinherit him in favor of his second son John. Partly cause and partly effect of this, Philip was given to cursing his father in most extravagant terms (of itself a capital offense according to old Scots law); he affirmed his parent "girned upon him like a sheep's head in a tongs;" on several occasions he had even attempted that parent's life: all which is set forth at great length in the "ditty" or indictment upon which he was tried. No doubt Sir James went in considerable fear of his unnatural son. A certain Mr. Roderick Mackenzie, advocate, testifies that eight days before the end he met the old gentleman in the Parliament Close, Edinburgh, whereupon "the defunct invited him to take his morning draught." As they partook Sir James bemoaned his domestic troubles. "Yes," said Mackenzie, "but why had he disherished his son?" And the defunct answered: "Ye do not know my son, for he is the greatest debauch in the earth. And that which troubles me most is that he twice attempted my own person."

Upon the last Saturday of November, 1687, the elder Standsfield traveled from Edinburgh to New Mills in company with Mr. John Bell, minister of the gospel, who was to officiate the next day in Morham Church (Morham is a secluded parish on the lower slope of the Lammermoors, some three miles southwest of New Mills; the church plays an important part in what follows). Arrived at New Mills the pair supped together, thereafter the host accompanied his guest to his chamber, where he sat talking "pertinently and to good purpose" till about ten o'clock. Left alone, our divine gat him to bed, but had scarce fallen asleep when he awoke in terror, for a terrible cry rang through the silence of the winter night. A confused murmur of voices and a noise of folk moving about succeeded. Mr. Bell incontinently set all down to "evil wicked spirits," so having seen to the bolts of his chamber door, and having fortified his timid soul with prayers, he huddled in bed again; but the voices and noises continuing outside the house he crept to the window, where peering out he perceived nought in the darkness. The noises died away across the garden towards the river, and Bell lay quaking till the morning. An hour after day Philip came to his chamber to ask if his father had been there, for he had been seeking him upon the banks of the water. "Why on the banks of that water?" queried Bell in natural amazement. Without answer Philip hurriedly left the room. Later that same Sunday morning a certain John Topping coming from Monkrig to New Mills, along the bank of the Tyne, saw a man's body floating on the water. Philip, drawn to the spot by some terrible fascination, was looking on (you picture his face). "Whose body was it?" asked the horror-struck Topping, but Philip replied not. Well *he* knew it was his father's corpse. It was noted that, though a hard frosty morning, the bank was "all beaten to mash with feet and the ground very open and mellow." The dead man being presently dragged forth and carried home was refused entry by Philip into the house so late his own, "for he had not died like a man, but like a beast" — the suggestion being that his father had drowned himself — and so the poor remains must rest in the woollen mill, and then in a cellar "where there was very little light." The gossips retailed unseemly fragments of scandal, as "within an hour after his father's body was brought from the water, he got the buckles from his father's shoes and put them in his;" and again, there is note of a hideous and sordid quarrel between Lady Stands-

field and Janet Johnstoun, "who was his own concubine," so the prosecution averred, "about some remains of the holland of the woonding-sheet," with some incriminating words of Philip that accompanied.

I now take up the story as given by Umphrey Spurway, described as an Englishman and clothier at New Mills. His suspicions caused him to write to Edinburgh that the Lord Advocate might be warned. Philip lost no time in trying to prevent an inquiry. At three or four of the clock on Monday morning Spurway, coming out of his house, saw "great lights at Sir James's gate;" grouped round were men and horses. He was told they were taking away the body to be buried at Morham, whereat honest Umphrey, much disturbed at this suspicious haste, sighed for the "crowner's quest law" of his fatherland. But on the next Tuesday night after he had gone to bed a party of five men, two of them surgeons, came post haste to his house from Edinburgh, and showing him an order "from my Lord Advocat for the taking up again the body of Sir James Standsfield," bid him rise and come. Philip also must go with the party to Morham. Here the grave was opened, the body taken out and carried into the church, where the surgeons made their examination, which clearly pointed to death by strangulation, not by drowning (possibly it struck Spurway as an odd use for a church; it had not seemed so to a Presbyterian Scot of the period). The dead being redressed in his grave clothes must now be set back in his coffin. A terrible thing happened. According to Scots custom the nearest relative must lift the body, and so Philip took the head, when lo! the corpse gushed forth blood on his hands! He dropped the head — the "considerable noise" it made in falling is noted by one of the surgeons — frantically essayed to wipe off the blood on his clothes, and with frenzied cries of "Lord have mercy upon me, Lord have mercy upon us!" fell half swooning across a seat. Strong cordials were administered, and in time he regained his sullen composure.

A strange scene to ponder over, but how terrible to witness! Think of it! The lonely church on the Lammermoors, the dead vast and middle of the dreary night (Nov. 30, 1687), the murdered man, and the parricide's confession (it is so set forth in the "ditty") wrung from him (as all believed) by the direct interposition of Providence. What fiction ever equaled this gruesome horror? Even his mother, who had sided with him against the father, scarce professed to believe his innocence. "What if they should put her bairn in prison?" she wailed. "Her bairn" was soon hard and fast in the gloomy old Tolbooth of Edinburgh, to which, as the "Heart of Midlothian," Scott's novel was in future days to give a world-wide fame.

The trial came on February 6 ensuing. In Scotland there is no inquest or public magisterial examination to discount the interest of the story, and the crowd that listened in the Parliament House to the evidence already detailed had their bellyful of surprises and horrors. The Crown had still in reserve this testimony, sensational and deadly. The prosecution proposed to call James Thomson, a boy of thirteen, and Anna Mark, a girl of ten. Their tender years were objected. My lords, declining to receive them as witnesses, oddly enough consented at the request of the jury to take their declaration. The boy told how Philip came to his father's house on the night of the murder. The lad was hurried off to bed, but listened whilst the panel, Janet Johnstoun, already mentioned, and his father and mother softly whispered together for a long time, until Philip's rage got the better of his discretion, and he loudly cursed his father and threatened his life. Next Philip and Janet left the house, and in the dead of night his father and mother followed. After two hours they crept back again; and the boy, supposed to be sleeping, heard them whisper to each other the story of the murder, how Philip guarded the chamber door "with a drawn sword and a bendit pistol," how it was strange a man should die so soon, how they carried the body to the water and threw it in, and how his mother ever since was afraid to stay alone in the house after nightfall. The evidence of Anna Mark was as to certain criminating words used by her mother Janet Johnstoun.

Up to this time the panel had been defended by four eminent advocates mercifully appointed thereto by the Privy Council; there had been the usual Allegations, Replyes, and Duplies, with frequent citations from Mattheus, Carpzovius, Muscard, and the other fossils, as to the matters contained in the "ditty" (indictment), and they had strenuously fought for him till now, but after the statement of the children they retired. Then Sir George Mackenzie rose to reply for the Crown. Famous in his own day, his name is not yet forgotten. He was "the bluidy advocate Mackenzie" of Covenanting legend and tradition, one of the figures in Wandering Willie's tale in "Redgauntlet" ("who for his worldly wit and wisdom had been to the rest as a god"). He had been lord advocate already, and was presently to be lord advocate again. Nominally but second counsel, he seems to have conducted the whole prosecution. He had a strong case, and he made the most of it. Passionate invective and prejudicial matter were mixed with legal argument. Cultured politician and jurist as he was, he dwelt with terrible emphasis on the scene in Morham Kirk. "God Almighty himself was pleased to bear a share in the testimonies which we produce." Nor was the children's testimony forgotten. "I need not fortifie so pregnant a probation." No! yet he omitted not to protest for "an assize of error against the inquest in the case they should assoilzie the pannal" — a plain intimation to jury that if they found Philip Standsfield "not guilty" they were liable to be prosecuted for an unjust verdict. But how to doubt after such evidence? The jury straightway declared the panel guilty, and my lords pronounced a sentence of picturesque barbarity. Standsfield was to be hanged at the Mercat Cross of Edinburgh, his tongue cut out and burned upon the scaffold, his right hand fixed above the east port of Haddington, and his dead body hung in chains upon the Gallow Lee, betwixt Leith and Edinburgh, his name disgraced forever, and all his property forfeited to the Crown. According to the old Scots custom the sentence was given "by the mouth of John Leslie, dempster of court" — an office held along with that of hangman. "Which is pronounced for doom" was the formula wherewith he concluded.

On February 15 Standsfield, though led to the scaffold, was reprieved for eight days "at the priest's desire, who had been tampering to turn Papist" (one remembers these were the last days of James II., or as they called him in Scotland, James VII.'s reign). Nothing came of the delay, and when finally brought out on the 24th "he called for Presbyterian ministers." Through some slipping of the rope, the execution was bungled; finally the hangman strangled his patient. The "near resemblance of his father's death" is noted by an eye-witness. "Yet Edmund was beloved." Leave was asked to bury the remains. One fancies this was on the part of Lady Standsfield, regarding whose complicity and doting fondness, strange stories were current. The prayer was refused, but the body was found lying in a ditch a few days after, and again the gossips (with a truly impious desire to "force the hand" of Providence) saw a likeness to the father's end. Once more the body was taken down and presently vanished.

Lord Fountainhall, a contemporary of Standsfield, and Sir Walter Scott, both Scots lawyers of high official position, thought the evidence of Standsfield's guilt not altogether conclusive, and believed something might be urged for the alternative theory of suicide. Whilst venturing to differ, I note the opinion of such eminent authorities with all respect.

Standsfield maintained his innocence to the last. Three ser-

vants of his father's — two men and a woman — were seized and tortured with the thumbikins. They confessed nothing. Now, torture was frequently used in old Scots criminal procedure, but if you did not confess you were almost held to have proved your innocence.

I cannot discover the after fate of these servants, and probably they were banished — a favorite method with the Scots authorities for getting rid of objectionable characters whose guilt was not sufficiently proved.

The second case, not so romantic albeit a love-story is woven through its tangled threads, is that of Mary Blandy, spinster, tried at Oxford in 1752, before two of the Barons of the Exchequer, for the murder of her father, Francis Blandy, attorney, and town clerk of Henley-on-Thames. Prosecuting counsel described her as "genteel, agreeable, sprightly, sensible." She was an only child. Her sire being well off she seemed an eligible match, and yet wooers tarried. Some years before the murder, the villain of the piece, William Henry Cranstoun, a younger son of the Scots Lord Cranstoun and an officer recruiting at Henley for the army, comes on the scene. Contemporary gossip paints him the blackest color. "His shape no ways genteel, his legs clumsy, he has nothing in the least elegant in his manner." He was remarkable for his dulness; he was dissipated and poverty-stricken. More fatal than all, he had a wife and child in Scotland, though he brazenly declared the marriage invalid spite the judgment of the Scots courts in its favor. Our respectable attorney, upon discovering these facts, gave the captain, as he was called, the cold shoulder. The prospect of a match with a lord's son was too much for Miss Blandy, now over thirty, and she was ready to believe any ridiculous yarn he spun about his northern entanglements. Fired by an exaggerated idea of old Blandy's riches, he planned his death, and found in the daughter an agent and, as the prosecution averred, an accomplice.

The way was prepared by a cunning use of popular superstitions. Mysterious sounds of music were heard about; at least Cranstoun said so; indeed, it was afterwards alleged he "hired a band to play under the windows." If any one asked "What then?" he whispered "that a wise woman, one Mrs. Morgan, in Scotland," had assured him that such was a sign of death to the head of the house within twelve months. The captain further alleged that he held the gift of second sight and had seen the worthy attorney's ghost, all which, being carefully reported to the servants by Miss Blandy, raised a pleasing horror in the kitchen. Cranstoun, from necessity or prudence, left Henley before the diabolical work began in earnest, but he supplied Mary with arsenic in powder, which she administered to her father for many months. The doses were so immoderate that the unfortunate man's teeth dropped whole from their sockets, whereat the undutiful daughter "damn'd him for a toothless old rogue and wished him to hell." Cranstoun, under the guise of a present of Scotch pebbles, sent her some more arsenic, nominally to rub them with. In the accompanying letter, July 18, 1751, he glowingly touched on the beauties of Scotland as an inducement to her, it was supposed, to make haste. Rather zealous than discreet, she near poisoned Anne Emmett, the charwoman, by misadventure, but brought her round again with great quantities of sack whey and thin mutton broth, sovereign remedies against arsenic.

Her father gradually became desperately ill. Susannah Gunnell, maidservant, perceiving a white powder at the bottom of a dish she was cleaning had it preserved. It proved to be arsenic, and was produced at the trial. Susannah actually told Mr. Blandy he was being poisoned; but he only remarked, "Poor lovesick girl! what will not a woman do for the man she loves?" Both master and maid fixed the chief, perhaps the whole, guilt on Cranstoun, the father confining himself to dropping some strong hints to his daughter, which made her throw Cranstoun's letters and the remainder of the poison on the fire, wherefrom the drug was in secret rescued and preserved by the servants.

Mr. Blandy was now hopelessly ill, and though experienced doctors were at length called in, he expired on Wednesday, Aug. 14, 1751. The sordid tragedy gets its most pathetic and highest touch from the attempts made by the dying man to shield his daughter and to hinder her from incriminating admissions which under excitement and (one hopes) remorse she began to make. And in his last hours he spoke to her words of pardon and solace. That night and again on Thursday morning the daughter made some distracted efforts to escape. "I ran out of the house and over the bridge, and had nothing on but a half-sack and petticoat without a hoop — my petticoats hanging about me." But now all Henley was crowded round the dwelling to watch the development of events. The mob pressed after the distracted girl, who took refuge at the sign of the Angel, a small inn just across the bridge. "They were going to open her father," she said, and "she could not bear the house." She was taken home and presently committed to Oxford gaol to await her trial. Here she was visited by the high sheriff, who "told me by order of the higher powers he must put an iron on me. I submitted as I always do to the higher powers" (she had little choice). Spite her terrible position and these indignities she behaved with calmness and courage.

The trial, which lasted twelve hours, took place on Feb. 29, 1752, in the Divinity School of the University. The prisoner was "sedate and composed without levity or dejection." Accused of felony, she had properly counsel only for points of law, but at her request they were allowed to examine and cross-examine the witnesses. Herself spoke a defense possibly prepared by her advisers, for though the style be artless, the reasoning is exceeding ingenious. She admitted she was passionate and thus accounted for some hasty expressions; the malevolence of servants had exaggerated these. Betty Binfield, one of the maids, was credibly reported to have said of her, "she should be glad to see the black bitch go up the ladder to be hanged." But the powder? Impossible to deny she had administered that. "I gave it to procure his love." Cranstoun, she affirmed, had sent it from Scotland, assuring her that it would so work, and Scotland, one notes, seemed to everybody "the shores of old romance," the home of magic incantations and mysterious charms. It was powerfully objected that Francis Blandy had never failed in love to his daughter, but she replied that the drug was given to reconcile her father to Cranstoun. She granted he meant to kill the old man in hopes to get his money, and she was the agent, but (she asserted) the innocent agent, of his wicked purpose. This theory, though the best available, was beset with difficulties. She had made many incriminating statements, there was the long time over which the doses had been spread, there was her knowledge of its effects on Anne Emmett the charwoman, there was the destruction of Cranstoun's letters, the production of which would have conclusively shown the exact measure in which guilty knowledge was shared. Finally, there was the attempt to destroy the powder. Bathurst, leading counsel for the Crown, delivered two highly rhetorical speeches, "drawing floods of tears from the most learned audience that perhaps ever attended an English provincial tribunal." The jury after some five minutes' consultation in the box returned a verdict of "guilty," which the prisoner received with perfect composure. All she asked was a little time "till I can settle my affairs and make my peace with God," and this was readily granted. She was left in prison five weeks.

The case continued to excite enormous interest, increased by an account which she issued from prison of her father's death and her relations with Cranstoun. She was constant in her professions of innocence, "nor did anything during the whole

course of her confinement so extremely shock her as the charge of infidelity which some uncharitable persons a little before her death brought against her." Some were convinced and denied her guilt, "as if," said Horace Walpole, "a woman who would not stick at parricide would scruple a lie." Others said she had hopes of pardon "from the honor she had formerly had of dancing for several nights with the late P———e of W———s, and being personally known to the most sweet tempered P———ess in the world." The press swarmed with pamphlets. The Cranstoun correspondence, alleged not destroyed, was published — a very palpable Grub Street forgery! and a tragedy, "The Fair Parricide," dismal in every sense, was inflicted on the world. The last scene of all was on April 6, 1752. "Miss Blandy suffered in a black bombazine short sack and petticoat, with a clean white handkerchief drawn over her face. Her hands were tied together with a strong black ribbon, and her feet at her own request almost touched the ground" ("Gentlemen, don't hang me high for the sake of decency," an illustration of British prudery which has escaped the notice of French critics). She mounted the ladder with some hesitation. "I am afraid I shall fall." For the last time she declared her innocence, and soon all was over. "The number of people attending her execution was computed at about 5,000, many of whom, and particularly several gentlemen of the university, were observed to shed tears" (tender-hearted "gentlemen of the university!"). "In about half an hour the body was cut down and carried through the crowd upon the shoulders of a man with her legs exposed very indecently." Late the same night she was laid beside her father and mother in Henley Church.

Cranstoun fled from justice and was outlawed. In December that same year he died in Flanders.

Cases of Interest.

Owner of Vicious Dog Enjoined. — In Reder *v.* Clarkson, — N. J. —, 78 Atl. Rep. 676, a preliminary injunction was issued against the owner of a vicious dog at the suit of his neighbors who complained that the dog in question was vicious; that it was only restrained by a fence over which it could jump at will; that the owner of the dog refused to adopt suitable measures to prevent its escape; that the complainants were in danger of being attacked by the dog at such times as they left their homes; and that the dog had been ordered killed by the municipality pursuant to an ordinance, but the execution of the order had been prevented by a writ of certiorari. The injunction restrained the defendant from longer keeping the dog on his premises without the adoption of suitable measures to prevent its escape.

"Trial Marriage" Permitted to Young Men under Eighteen. — In Titsworth *v.* Titsworth, — N. J. —, 78 Atl. Rep. 687, which was an action to have a marriage annulled, brought by a husband under a New Jersey statute passed in 1907, permitting a decree of nullity "at the suit of the husband when he was under the age of eighteen at the time of the marriage, unless such marriage be confirmed by him after arriving at such age," the court said of the statute that it made a very radical change in the marriage law of New Jersey. Further the court said: "Young men under eighteen years of age are thus permitted to contract a trial marriage, and if the wife be above sixteen years of age, it will be optional with the husband alone to affirm or disaffirm the marriage when he shall reach the age of eighteen years or at any time before."

Validity of Gift Immediately Loaned to Donor. — In Garrison *v.* Union Trust Company, — Mich. —, 129 N. W. Rep. 691, it appeared that an aunt gave a ring to her nephew, but immediately asked to have it back, saying: "Jim, let me take it and wear it till I am through with it, but the ring is yours." So he handed it back to her, and she put it on her finger and wore it till her death, but she spoke of it from time to time as his ring. It was held that the transaction constituted a valid gift. The court said: "Counsel insists that, because the donor had the ring in her possession until her death, that fact shows conclusively that she intended no gift. After the gift was once completed and the title had passed to the plaintiff, he could loan it to her or to any one else without affecting the validity of the gift."

Statute Requiring Governor to Accept Donation of Bonds. — In State *v.* Dickerson, — Nev. —, 113 Pac. Rep. 105, it was held that the governor of the State of Nevada could be compelled by mandamus to accept on behalf of the State 145 bonds of the State of North Carolina by virtue of an act of the legislature which provided in part as follows: "Whenever any grant, devise, bequest, donation or gift or assignment of money, bonds, or choses in action, or of any property, real or personal, shall be made to this State, the governor is hereby directed to receive and accept the same, so that the right and title to the same shall pass to the State." It was held that the statute imposed on the governor a ministerial duty which could not be evaded, the constitution of Nevada nowhere exempting the governor from being required, the same as other officers, to perform ministerial acts such as were required by the statute, which in no way conflicted with or pertained to his constitutional prerogatives.

Liability of Municipality for Death of Spectator at Automobile Race on Public Street. — In Bogart *v.* City of New York, — N. Y. —, 93 N. E. Rep. 937, it was held that the city of New York was not liable for the death of a spectator at an automobile race illegally authorized by the board of aldermen of the city on the public streets of Richmond borough, the death occurring as the result of being struck by one of the racing automobiles, which swerved in the course and left the highway. It seems, however, that the city would have been liable had the person killed been a traveler and not a spectator. The court said: "It is not claimed by the plaintiff that the defendant was negligent in the conduct of the races. It may be assumed that the defendant is liable to the plaintiff for any injuries to her arising from the illegal use of the highway, if her intestate was injured while using the highway as a traveler. If, however, the intestate was injured while a spectator in attendance at the races to witness them and enjoy the pleasure that the contest afforded, the plaintiff is not entitled to recover, and the judgment should be reversed."

What Constitutes Violation of Gasoline Clause in Insurance Policy. — In Clute *v.* Clintonville Mut. Fire Ins. Co., — Wis. —, 129 N. W. Rep. 661, it was held that a gasoline clause in a fire insurance policy on a factory, that gasoline should not be "kept or allowed" on the premises, was not violated where it appeared from the evidence that a week or two before a fire in the factory the insured ordered five gallons of gasoline, not intended for use in the factory, or to be kept there, without directing, however, where it should be sent; that it was delivered at the factory while the insured was out; that he returned very shortly thereafter, and found the gasoline, and instructed one of the employees to set it outside; and that it remained outside until the insured went home to supper, when he took it with him. The trial court instructed the jury that the words "kept or allowed" did not refer to temporary presence on the premises of gasoline, and that the prohibition meant something more than a mere casual taking of gasoline on the premises and removing it soon after. This was held to be a correct instruction in the abstract.

PREVIOUS CONVICTION AS AFFECTING CREDIBILITY OF WITNESS. — In Hendrix *v.* State, — Okla —, 113 Pac. 244, which was a prosecution for violating the liquor law, it appeared that in the trial court the State was permitted to ask the defendant on his cross-examination, for the purpose of affecting his credibility as a witness, if he had previously been convicted for violating the prohibitory law of the State. On appeal it was held that no error had been committed. The court said: "In the case of Slater *v.* United States, 1 Okl. Cr. R. 275, 98 Pac. 110, this court held that upon cross-examination for the purpose of affecting the credibility of a witness, he may be asked if he had ever been convicted of a felony or of any crime which involves a want of moral character. . . . The illegal sale of intoxicating liquor, wrongfully and deliberately committed, is an immoral, degrading, and degraded act, and is committed only by the lawless and unreliable classes of our population. It is a matter of common notoriety that in nine cases out of ten the 'bootlegger' will not only not hesitate to commit perjury in his own behalf, but also he expects every man to whom he vends his stuff to commit perjury for him should the occasion arise. The unlawful sale of intoxicating liquor involves moral turpitude, and shows a want of moral character. Therefore, for the purpose of affecting the credibility of a witness, he may be asked and required to answer whether he has been convicted of this offense."

LIABILITY OF OWNER OF AUTOMOBILE FOR NEGLIGENT ACT OF DRIVER WHILE DEVIATING FROM ROUTE. — In Fleischner *v.* Durgin, — Mass. —, 93 N. E. Rep. 801, it appeared that the plaintiff while in the exercise of due care and traveling on a street in Boston was injured by being struck by the defendant's motor car driven by a person who had been employed by the defendant to take the car from a certain garage in the town of Brookline, several miles from Boston, to another garage in the same town, less than a mile from the first garage, for some repairs, but who had deviated from the route to the second garage to go to Boston for the purpose of getting a chain for his own uses, and was returning to Brookline, and to the second garage, when the accident occurred. On these facts it was held that the defendant was not liable for the injury, because of the deviation which was unauthorized by him. The court said: "The principles which govern the rights of the parties are settled. The master is liable for the act of a servant in charge of his vehicle when the latter is acting in the main with the master's express or implied authority, upon his business and in the course of the employment for the purpose of doing the work for which he is engaged. The master is not liable if the servant has abandoned his obligations, and is doing something not in compliance with the express or implied authority given, and is not acting in pursuance of the general purpose of his occupation or in connection with the doing of the master's work. Under this rule the employer has been held responsible for wrongs done to third persons by his driver during incidental departures from the scope of the authority conferred by the employment and upon comparatively insignificant deviations from the direct routes of travel, but within the general penumbra of the duty for which he is engaged. Hayes *v.* Wilkins, 194 Mass. 223, 80 N. E. Rep. 449, 9 L. R. A. (N. S.) 1033, 120 Am. St. Rep. 549. The employment of Freeman was limited to a specific and short trip within a town. He took the car several miles out of the way, which was six or seven times as far as he had a right to go, to a crowded part of a large city, on an errand wholly of his own, and had only just commenced to return at the time the act occurred for which damages are sought in this action. He was acting in disregard of his instructions, and wholly outside his employment, and for a purpose having no relation even remote to the business of the master. The extent of the excursion which he undertook on his own account was so disproportionate to the length of the route he was authorized to go, that it cannot be minimized to a deviation. It was in fact the chief journey. There is nothing to indicate that the defendant had any hint or ground for suspicion of this unwarranted use of his property. Under such circumstances he cannot be held liable."

RIGHT OF CHILDREN BORN AFTER MAKING OF WILL TO SHARE IN TESTATOR'S ESTATE. — In Tavshanjian *v.* Abbott, — N. Y. —, 93 N. E. Rep. 978, it appeared that after the making of a will by a testator without children at the date of the making, a child was born, and a codicil was therefore executed which after making provision for the child provided as follows: "In the event of the death of myself, wife and child or children at one and the same time, through some accident or otherwise, I direct my executors to give to each and every one of my legatees double the amounts each and every one of my legatees would have received under natural circumstances," etc. After the execution of the codicil the child named therein died and two daughters were born who survived the testator. It was held that notwithstanding the codicil contained the word "children," these after-born children were not unmentioned therein within the meaning of the following statute: "Whenever a testator shall have a child born after the making of a last will, either in the lifetime or after the death of such testator, and shall die leaving such child, so after-born, unprovided for by any settlement, and neither provided for nor in any way mentioned in such will, every such child shall succeed to the same portion of such parent's real and personal estate as would have descended or been distributed to such child if such parent had died intestate, and shall be entitled to recover the same portion from the devisees and legatees, in proportion to and out of the parts devised and bequeathed to them by such will." The court said: "The mention of children is not such as to convey any idea of a purpose not to provide for those who might be born thereafter. . . . This testator was contemplating the possibility of some disaster terminating the lives of his family simultaneously, and it is quite plain that it was not the birth thereafter of children, which was in his mind, nor a provision which was to exclude them from any share of his estate. The statutory provision was derived from a rule of the civil law, which, upon the subsequent birth of a child, unnoticed in the will, annulled the will. It is based upon the strong presumption of an oversight, or an unintentional neglect of the testator to provide for those who have a natural and moral claim to a provision for their support out of their father's property. It was not intended to contravene the policy of our law to give to every one, competent to make a will, the right absolutely to control the disposition of his estate; it was intended to provide a rule, by which an intent to disinherit must appear from the will itself. . . . If there were any doubt as to the construction to be given to this will, it should be resolved in favor of the testator's children, upon the soundest principles of justice. I think that no doubt does arise, upon a fair consideration of the will, and that there is nothing to suggest an intention not to make provision for unborn children."

News of the Profession.

THE RHODE ISLAND BAR ASSOCIATION held its first annual smoker at Providence on February 23.

THE LOUISIANA BAR ASSOCIATION has decided to hold its next annual convention at Lake Charles, La., on June 2 and 3.

APPOINTED SURROGATE OF NEW YORK COUNTY. — Robert Ludlow Fowler has been appointed surrogate of New York county to succeed the late Abner C. Thomas.

NEW MONTANA SENATOR. — Henry L. Myers, judge of the District Court in Hamilton, Mont., was elected United States senator from Montana on March 3 to succeed Thomas H. Carter.

DISTINGUISHED BOSTON LAWYER DEAD. — Thomas Hastings Russell, aged ninety-one years, the oldest member of the Suffolk bar and the senior member of the Boston Bar Association, of which he was one of the founders in 1876, died in Boston on February 24.

DEATH OF TENNESSEE JUDGE. — Judge John M. Taylor of the Tennessee Court of Appeals died last month at his home in Lexington, aged seventy-two years. H. Nelson Cate has been appointed to fill the vacancy on the bench created by Judge Taylor's death.

NEW UNITED STATES ATTORNEY. — Andrew B. Dunsmore, of Wellsboro, Pa., has been appointed United States attorney for the middle district of Pennsylvania. Mr. Dunsmore was assistant district attorney under Charles B. Witmer, who has succeeded Judge Archbald on the bench in the middle district.

APPOINTMENT TO SUPREME BENCH OF OHIO. — George L. Bunn, judge of the Ramsey County District Court, has been appointed to fill the vacancy on the Minnesota Supreme Court bench caused by the death of Justice E. A. Jaggard. Judge Bunn will hold office until the general election of 1912.

FILIPINO ADMITTED TO CALIFORNIA BAR. — Francisco A. Concepcion, a native of Manila and the nephew of Judge Pedro Concepcion of the Superior Court in Manila, has been admitted to the California bar. It is said that he is the first Filipino to achieve such distinction in the United States.

EX-GOVERNOR OF MARYLAND DEAD. — John Lee Carroll, governor of Maryland from 1876 to 1880, died in Baltimore on February 27 after a long illness. Governor Carroll studied law at Harvard and after being admitted to the Maryland State bar practiced law in Baltimore for a number of years. He was eighty-one years of age at the time of his death.

COMMERCE COURT ORGANIZED. — Formal organization of the recently created Commerce Court has been effected, and the following officers have been appointed: Clerk, George Fletcher Snyder, Elkins, W. Va.; deputy clerk, Wilbur S. Hinman, Cleveland, Ohio; marshal, Frank Jerome Starck, Cleveland, Ohio; deputy marshal, James L. Murphy, Washington, D. C.

NEW YORK JUDICIAL APPOINTMENTS. — Governor Dix of New York has made the following appointments to the bench: Henry Purcell, Watertown, justice of the Supreme Court, Fifth Judicial District, to succeed the late Watson M. Rogers; Thomas H. Dowd, Salamanca, county judge of Cattaraugus county, to fill the vacancy caused by the death of Winfield S. Thrasher.

NEW MASSACHUSETTS JUDGE. — The announcement in these columns last month of the appointment by Governor Foss of John W. Cummings to succeed the late Judge Bond on the bench of the Massachusetts Superior Court, was, it seems, premature. Mr. Cummings declined the proffered honor, and the governor has named Joseph F. Quinn, of Salem, Mass., to fill the vacancy.

REPRESENTATIVE ALLEN DEAD. — Representative Amos L. Allen, of Maine, died in Washington, D. C., on February 20. Mr. Allen was a lawyer but has not been in active practice for a number of years. He was private secretary to Speaker Thomas B. Reed in the Fifty-first, Fifty-fourth, and Fifty-fifth Congresses, and was elected to the Fifty-sixth Congress in 1899 to fill the vacancy caused by the resignation of Speaker Reed. He has served continuously since, but was not re-elected last fall.

TWO MARYLAND JURISTS DEAD. — David Fowler, formerly judge of the Maryland Court of Appeals, and for many years one of the prominent lawyers of Baltimore, died at his home in that city early in February. On March 3 death claimed also Judge Samuel D. Schmucker of the Court of Appeals. Judge Schmucker was one of the most conspicuous members of the legal profession in Maryland. He was appointed to the bench in 1898 to fill a vacancy, and was elected for a full term of fifteen years in 1899.

PRESIDENT APPOINTS NEGRO LAWYERS TO OFFICE. — President Taft has nominated William H. Lewis, a negro lawyer of Boston, as assistant attorney-general of the United States, to succeed John G. Thompson, resigned. Lewis is a graduate of Amherst College and Harvard law school. He has been assistant United States attorney at Boston for a number of years. The President has also appointed J. C. Napier, a well-known negro lawyer of Nashville, to the position of register of the United States treasury.

DEATH OF PROMINENT NEW YORK ATTORNEY. — James McKeen, a distinguished lawyer and writer on civil and legal subjects, died in Brooklyn on February 22. McKeen rendered valuable assistance to Justice Charles E. Hughes when the latter was counsel to the legislative committee which investigated the insurance companies in New York city. McKeen's written works include "Evolution of Penal Code Methods and Institutions," "Factors in American Civilization," and kindred subjects.

FORMER CHIEF JUSTICE OF DELAWARE DEAD. — Charles Brown Lore, former chief justice of Delaware, died at his home in Wilmington, Del., on March 6, at the age of eighty years. Judge Lore had been honored by his State, but at the time of his death his only connection with State affairs was as a member of the State Code Revision Commission. He served as chief justice from 1893 to 1909. He was at one time attorney-general, and he was a member of the Forty-eighth and Forty-ninth Congresses previous to being chief justice. In both bodies he was an active force and attracted national attention by his speeches and the stand he took on many important questions.

CONNECTICUT STATE BAR ASSOCIATION. — The State Bar Association of Connecticut held its annual meeting at Bridgeport on February 6. At the afternoon session the annual address of the president was delivered by George E. Hill, of Bridgeport, following which a paper on "Sham Issues" was read by Talcott H. Russell, of New Haven. At the banquet in the evening the speakers were Hon. Charles S. Sherrill, United States minister to Argentina; Mayor E. L. Smith, of Hartford, and Senator Stiles Judson, of Stratford. The election of officers resulted as follows: President, George E. Hill, Bridgeport; vice-president, Hadlai A. Hull, New London; secretary and treasurer, James E. Wheeler, New Haven.

CHANGES IN FEDERAL JUDICIARY. — The following federal judiciary appointments have been made by President Taft: Judge George E. Martin, of the Court of Common Pleas of Ohio, to be associate judge of the United States Court of Customs Appeals to succeed Judge William H. Hunt; Charles B. Witmer, of Sunbury, Pa., to succeed Judge Archbald on the bench of the Federal Court for the third district of Pennsylvania; District Judge Arthur C. Denison, of Grand Rapids, to be circuit judge of the sixth circuit, to succeed Judge Severens, resigned; Alexis C. Angell, of Detroit, to be district judge at Detroit to succeed Judge Swan; Clarence W. Sessions, of Muskegon, to be district judge at Grand Rapids to succeed Judge Denison.

FLORIDA STATE BAR ASSOCIATION. — The fifth annual session of the Florida Bar Association was held in Pensacola on February 23 and 24. There was a much larger attendance than at

any previous convention since the organization of the association. On the first day of the session the annual address of President Jefferson B. Browne, of Key West, was delivered, the subject being "Government Questions." This was followed by an address on "The Outlook for Procedure Reform in Florida," by George C. Bedell, of Jacksonville. On February 24 W. O. Hart, chairman of the committee on uniform State laws of the Louisiana Bar Association and a member of the same committee of the American Bar Association, also one of the commissioners on uniform State laws from Louisiana, read a paper on "Uniformity of Legislation." The session was brought to a close with a banquet given by the Pensacola Bar Association. The following officers were elected for the ensuing year: President, W. A. Blount, Pensacola; vice-presidents, Thomas F. West, Milton; J. W. Henderson, Tallahassee; Cory Hardee, Live Oak; William Hocker, Ocala; Herbert S. Philips, Tampa; Joseph H. Jones, Orlando; E. Noble Calhoun, Palatka; secretary, George C. Gibbs, Jacksonville; treasurer, John W. Burton, Arcadia; members of executive council, W. A. MacWilliams, St. Augustine; E. P. Axtell, Jacksonville; F. W. Simonton, Tampa; W. H. Price, Marianna.

Judge Lowell, of Boston, Dead. — United States Circuit Judge Francis Cabot Lowell died suddenly at his home in Boston on March 6. The deceased jurist was a member of the distinguished Lowell family of Massachusetts. Next to his judicial ability he was best known for his intimate association with Harvard. Like all of his ancestors, beginning with his great-great-grandfather, the Rev. John Lowell, who graduated in 1721, Judge Lowell was trained at Harvard. He was graduated in 1876, and spent the two succeeding years at the Harvard law school. Later he became one of the overseers of the college and then a fellow of the corporation. His cousin and brother-in-law, A. Lawrence Lowell, is the present head of Harvard University. Before taking his place on the Federal bench, the judge served the city of Boston and the State of Massachusetts as a member of the Boston common council and the House of Representatives. He served in the council in 1889, 1890, and 1891, and in the House in 1895, 1896, 1897, and was re-elected for 1898, but resigned during the first week of the session to become judge of the United States District Court. President McKinley appointed him. After serving with great ability on the district bench for seven years, he was appointed by President Roosevelt to the circuit bench Feb. 23, 1905. The judge had attained a considerable reputation as an author by a "Life of Joan of Arc," which he published before taking his place on the bench. This penchant for literature led him to contribute many articles to magazines and periodicals. In collaboration with President Lowell, of Harvard, he produced an able legal work on the "Transfer of Stock in Private Corporations." He also wrote a number of able expositions of the Unitarian faith, being one of the leading laymen of that denomination in the country. Judge Lowell's death came as a great shock to his friends, for although he had been out of health for some time, his condition had of late showed some improvement. At the age of fifty-six he was in his prime, and a career second to none in the annals of the judiciary of Massachusetts seemed to lie before him.

English Notes.

Lecture before International Peace Association. — The Rev. T. J. Lawrence, M. A., LL.D., formerly deputy professor of international law in Cambridge University, delivered the first of the Hodgson Pratt memorial lectures for the International Arbitration and Peace Association at Essex Hall, Essex street, Strand, W. C., on Tuesday, February 28. Sir Albert Spicer, Bart., M. P., presided. His subject was "The Declaration of London."

London's Criminal Record. — In a report just issued particulars are given of the state of crime in the city of London during 1910. The number of persons prosecuted for summary offenses was 3,863, against 4,590 in 1909 and 5,533 in 1908. The number of persons convicted of summary offenses (including 717 for drunkenness) was 2,663, against 3,285 in the previous year. The convictions for drunkenness were nearly 200 less than in 1909. There were 778 summary charges proved, but in which no sentences were recorded. Thirty-five probation orders were issued. Of indictable offenses committed 963 were recorded and 606 persons were arrested or summoned in respect of them. One hundred and seventy-five juvenile offenders were charged, and of these 45 were sent to industrial schools. The juvenile offenders were 23 more than in 1909.

Woman's Suffrage. — The figures lately published in the *Anti-suffrage Review* are important to those unbiased readers who want to know facts upon which to base their opinions as to the women's franchise movement. The result of the figures indicates that women as a whole are either largely indifferent to, or at any rate are not greatly enamored with, the agitation. The canvass of female municipal electors invited an expression of opinion from 41,757 women. Of these 5,579 desired the franchise, and 18,850 opposed it. No fewer than 12,621 returned no answer, and 4,707 stated that they were indifferent. This evidence is not, of course, conclusive, but it merits notice and suggests possibly that proposals causing so many consequential changes may profitably be deferred until a more universal demand arises in their favor. Directly there is any general consensus of opinion in this direction the usual result will follow, and Parliament will be impelled to act in accordance with it.

Prefer Prison to Workhouse. — Mr. Justice Channel, in charging a grand jury recently, said a feature of the calendar was that there were thirteen prisoners charged with stealing goods exposed outside shops, who were either caught in the act or directly afterwards. In many of such cases the prisoner had obviously committed the offense with the view of getting into prison. In a neighboring county he had been frankly told that certain men preferred prison to the workhouse. This was not a satisfactory state of things. It was, he supposed, not desirable in the workhouse to treat tramps in a somewhat different way to the *bona fide* man out of work. All the same, the perfectly honest man in search of work who sought refuge for the night should not be so treated that he deliberately preferred prison. He could not help thinking that either one, or possibly both, institutions were not managed as they ought to be. The prisons ought to be made more uncomfortable, at any rate, for those serving short sentences.

Compensation for Erroneous Conviction of Crime. — In the administration of justice it is unavoidable that erroneous convictions will sometimes occur, and that circumstances afterwards brought to light will prove that an innocent person has unfortunately been condemned. While the government are bound to afford every facility to enable one who has thus unjustly suffered to re-establish his innocence, this principle has never been acknowledged, that such persons are entitled to claim pecuniary compensation either from the government or from Parliament. In 1856, however, a case occurred of extraordinary hardship. In the year 1843 Mr. W. H. Barber, a solicitor, was convicted of forgery and transported to Norfolk Island. In 1858 a select committee of the House of Commons appointed to consider his petition and report upon it agreed that every allegation in the petition was true, and that Mr. Barber, while wholly innocent, had endured suffering which entitled him to

the favorable consideration of the government; whereupon a sum of £5000 was included in the estimates as a compensation to this gentleman. In 1879, compensation in a money grant voted by Parliament was given to a man named Habron sentenced to death — a sentence afterwards commuted to penal servitude for life — on conviction for a murder perpetrated by Peace; while the Beck case, in which compensation was likewise given, a case which led to the establishment of the Court of Criminal Appeal, is fresh in the recollection of members of the legal profession and of the public at large.

MOTORISTS AND THE LAW. — Two more motor cases reported in the daily press illustrate the harshness of the present legal system of administration. In one case heard at Kingston one H. was charged with an offense, and the court was satisfied that he and his car were far away from the spot indicated by the police. In making good his defense and in traveling expenses H. was put to an expense of something like £20, but the court refused to give him costs against the police. Here was not some case in which the offender was lucky enough to get off on a legal technicality, but his success was due entirely to the fact that he had had nothing in the world to do with the matter in question. It certainly seems monstrous that under such circumstances costs should be refused. Another case of speedometer *versus* stop-watch has also resulted in a decision in favor of the cheap, untested instrument in the hands of a novice as against an expensive instrument worked by mechanical means and carefully watched by the driver. It is difficult to understand the airy manner in which the plain and sworn testimony of drivers is waived aside in favor of presumably honest but certainly haphazard evidence of other parties. Before the Motor Car Act 1903 is renewed it would seem very desirable that some attention should be drawn by means of a debate in Parliament to the working of the legislation in question, and that some steps should be taken to insure that the safety of the public should be secured without inflicting a vexatious administration of the law on the motorist. The fact that some areas do not find it necessary to adopt this vindictive attitude suggests that there are divergent practices at work, and no legal system can be fair unless it is worked on some uniform basis.

IMPEACHMENT OF JUDGES. — The cases in recent times in which the conduct of judges has been the subject of stricture in the House of Commons are few and far between. In February, 1834, O'Connell brought before the House a complaint against Sir William Smith, one of the Barons of the Court of Exchequer, for "neglect of duty as a judge and for the introduction of political topics in his charges to grand juries," and concluded by moving that a committee be appointed to inquire into the conduct of Mr. Baron Smith in respect to these allegations, which was agreed to. On February 21, however, it was represented to the House that a *prima facie* case for the removal of Baron Smith from the bench by a proceeding under the statute had not been made out. It was accordingly moved that the order for the appointment of the committee be discharged, and the motion, after a long and acrimonious debate, was carried. On Feb. 21, 1843, Mr. Duncombe called the attention of the House of Commons to the "partial, unconstitutional, and oppressive" conduct of Lord Abinger, the Lord Chief Baron, while presiding at a special commission issued for Lancashire and Cheshire. The motion for an inquiry was defeated by 228 votes to 78. On Aug. 9, 1872, Mr. Isaac Butt, the leader of the Irish National Party, brought forward a motion impugning the conduct of Mr. Justice Keogh at the trial of the Galway election petition, which was defeated by a large majority, only twenty-three voting in its favor. The motion with reference to the conduct of Mr. Justice Grantham at the trial of the Yarmouth election petition, which was discussed in the House of Commons on July 7, 1906, has been recalled to recollection by recent circumstances.

PREVENTIVE DETENTION OF CRIMINALS. — The draft rules under the Prevention of Crimes Act 1908 for preventive detention are such as demand some attention by the legal profession. The main proposal is to subdivide into three grades the classes of persons subjected to preventive detention, viz.: (1) ordinary, (2) special, and (3) disciplinary. After six months in class 1 a prisoner can be awarded a certificate for good conduct, and on obtaining four such certificates can be promoted to class 2. Each certificate will be further recognized by a good conduct stripe or a small money payment. Class 3 is created for the treatment of acts of misconduct, and will lead (*inter alia*) to the prisoner being dissociated from his fellows except when at labor. The nature of the employment given to prisoners will be various. Agriculture, trades, prison service, and so forth, will be available, and, as regards classes 1 and 2, gratuities may be earned and spent in additions to the dietary, or in remittances to the family, or they may be accumulated. A canteen is to be opened, and a garden allotment may be assigned to prisoners who have earned three certificates of good conduct. Certain privileges are proposed in the matter of letters and society, and provision is made for moral and religious influences. These draft rules are to come into force in May, and they explicitly recognize the elementary fact, sometimes forgotten by zealous reformers, that, after all said and done, preventive detention is essentially a corrective and an alternative form of imprisonment. Prisoners of a determined class will come within its range, and a very firm hand must be maintained over them instead of subjecting them to any weak-kneed scheme of mere asylum treatment suitable for a feeble-minded social nuisance. This last word is really of some importance as a criterion. Mere pilfering is not to justify proceedings under the Act, but the selection of cases must turn on the offense being substantial and serious. The memorandum shows that the scheme is, in a word, not to be employed as an easy way of disposing of an habitual offender, but as an exceptional plan for protecting society from a bad class of professional criminals.

Obiter Dicta.

A ROSE BY ANY OTHER NAME. — The Superior Court of Connecticut has just granted a divorce on the ground of "corporal imbecility."

BED AND BAR. — The bar is never a bed of roses. If one is successful it is all roses and no bed, and if one is unsuccessful it is all bed and no roses. — *Sir Rufus Isaacs.*

HOW COULD HE HELP IT? — In Taylor *v.* State, 38 Tex. Crim. 241, Ananias Carter was a witness for the defendant. He was promptly arrested for perjury before he left the court room.

DOMESTIC RELATIONS JUDICIALLY NOTICED. — "As a matter of common knowledge it is often the case that a married person cannot live peaceably in the family of his or her father-in-law and mother-in-law." *Per* Canty, J., in Grant *v.* Grant, 64 Minn. 234.

A PROGRESSIVE ENEMY OF RACE SUICIDE. — In State *v.* Brown, 5 Harr. (Del.) 505, the prosecuting witness, Isaac Nathans, a negro, testified as follows: "I have had fifty-one children, by three wives; fourteen by the first, fifteen by the second, and twenty-one by the third, all born alive."

REVERSIBLE ERROR. — Because the judge took his seat on the bench attired as George Washington, an Indiana man, convicted of murder, has appealed. As to the exact theory of the

appeal we are not informed, but there certainly is a veiled suggestion that the judge did not possess the attributes of the one whom he imitated.

A BIG MAN. — The advisability of extending our collection to include letterheads of the laity is extremely doubtful, but the following must go in come what may. The man whom it advertises was, it seems, a justice of the peace for several years before his election to the Texas legislature:

OFFICE OF

B. C. HALL, DEALER IN

MEMBER 32nd TEXAS LEGISLATURE, **GENERAL MERCHANDISE**

Henderson Co. 29th District. At New York, Texas.

Age 41 Years. Weight 312.

CAUSE AND EFFECT. — In South Covington, etc., St. R. Co. *v.* McCleave, 38 S. W. Rep. 1055, the Court of Appeals of Kentucky, said: "Appellee's wife was not a competent witness, and when informed by the attorney of appellant that he inadvertently, and while suffering from a severe headache, consented for her to be sworn, the lower court ought, it seems to us, to have, on his motion, excluded her testimony." Is it difficult to imagine the cause of that headache? The history of Kentucky as found in its own law reports furnishes abundant answer to the question. In 1818 Chief Justice Boyle said, in the case of Ripperdan *v.* Scott, 1 A. K. Marsh. 151: "It is impossible to believe that the current market price of whiskey should not have been *diffusively* known."

MUDDY WATERS. — At a banquet in New York recently Joseph H. Choate was speaking in praise of American lawyers.

"You might think, the way some people talk," said Mr. Choate, "that the American lawyer couldn't be honest if he wanted to. You would think he worked in such muddy waters that —"

Mr. Choate paused and smiled.

"Well," he resumed, "you might think that the American lawyer was in Breef's case.

"Breef, you know, was accused of bribery. He admitted the charge.

"'What, sir?' the judge thundered. 'What! you, a practicing lawyer, admit without shame that you bribed the witness?'

"'Yes, your honor,' said Breef, hastily. 'But I bribed him to tell the truth. He had been bribed by the other side to lie.'"

OF SUCH IS THE BROTHERHOOD OF EXPERTS. — The following certificate of a physician was filed recently in the Criminal Court of Record of Suwanee county, Florida, in support of a motion for a continuance in the case of State *v.* Jesse Hart, a prosecution for grand larceny:

LIVE OAK, FLORIDA, 2-14-1911.

Hon. E. E. CARTER,
Judge of Criminal Court.

I certify that Jessee Hart is sick & was treated by stung all over by Bees & high fever. Unable to be out of bed.

T. S. ANDERSON, M. D.

Somewhat in line with the foregoing is the following excerpt relating to a witness who actually attempted to qualify as an expert: "Defendant further claims that a witness which he sought to introduce — Witt, by name — should have been allowed to testify as an expert; but his examination shows that he was unskilled, so far, as least, as the use of the English language is concerned. He testified that the disease called 'scab' was caused by an insect, which was not visible to the naked eye, but which he had examined often through the telescope, and then corrected himself by saying that he had looked at it through the telephone. Other parts of his testimony indicate about the same degree of general intelligence." *Per* Holt, J., in Bryant *v.* Tripp, 36 Kan. 700.

ADMITTED. — A correspondent sends us the following, believing it to be entitled to a place of honor in our Hall of Fame for Lawyers' Cards and Letter-heads:

1871 OFFICE OF **1910**

W. P. KNOTE, M. D., N. P.,

Attorney-at-Law, Ex-Banker; Money to Loan

On Personal or Chattel Mortgage Security. Will also Borrow Money and Pay Interest on Same. Insist on Mortgage Being Attended to When Due.

Best Collector in the State; Bad Accounts Bought; Hard Collections Solicited.

Osborne Mowers and Binders; Beggs Wagons and Buggies for Sale.

Equitable Life Insurance Agent.

MOTTO:—"SQUARE DEALING."

Douglass, Butler County, Kansas.

A MODEST REQUEST. — The librarian of the Boston Bar Association Library recently received the following self-explanatory communication:

A. N. PORTER, Librarian Boston Bar Association,

Sofia, 1 Febr. 1911.

Dear Sir,

Please give me some informations concerning the following questions.

1. Which are the requirements for Admission to the Bar of the different States of America (U. S. A.)?
2. Which are the Positions and Appointments an American Lawyer (or European) can obtain, as beginner, in the different branches of Public Service, or of Private Business Administration? (in America)
3. Which is the best way for an Lawyer to find a suitable Position in America?

Which is the best intermediary between Law-Studied Men and the different Positions, they can enter?

4. Which are the average Emoluments (Salary) an American (or European) Lawyer, and generally Law-Studied Man, can obtain as beginner in the different Positions?
5. Which is the general economical and social Situation of Lawyers in America?

Is there in America an overcrowding of Lawyers like in Europe?

Are European Lawyers admissible to different Public or private Positions in America (U. S. A.)?

Please let me know the names of the best american official or private Publications containing different Informations concerning all these questions.

Please let me also know the Addresses of the most important American official or private Institutions, to which I can address myself for detailed informations.

My friend and Colleague Professor v. Schönberg of the University of Berlin (Germany) was so kind to give me Your Address. He affirms and I hope, that You will be so amiable to give me the best informations You can, concerning all these questions.

I need these informations for a critical and comperative study, concerning the Lawyers and in generally the Law-Studied Men of all civilised countries of the World (comperative Investigation).

I will be, Dear Sir, very happy to be of any Service to You.

Yours very trully

.....

Correspondence.

INFORMATION WANTED.

To the Editor of LAW NOTES.

SIR: I am too poor to buy all the books I need. Pleas give me some information on colored people as jurors. How is jury selected. How can you have a colored man put on as a jury. If the colored are over looked from time to trial what steps to take to have him put on? Pleas give me information on this jury matter.

(Signed) PERCY G. SHADD.

MARTIN, TENN.

Law Notes

MAY, 1911.

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CONTENTS

New York Workmen's Compensation Act Held Unconstitutional.

ELSEWHERE in this number of LAW NOTES we have stated, substantially in the language of the judges, the grounds for the recent decision of the New York Court of Appeals declaring the New York Workmen's Compensation Act of 1910 — commonly styled the Wainwright law — unconstitutional as in violation of the due process of law clause of the Federal and State Constitutions. Views of various members of the legal committee of the National Civic Federation — department on compensation for industrial accidents and their prevention — have been printed in pamphlet form and widely distributed. P. Tecumseh Sherman, Esq., of New York, chairman of the committee, thinks the decision will not be treated as very authoritative outside of New York State. In our judgment he is rather too sanguine. There is a strong presumption based on experience that a unanimous opinion of the New York Court of Appeals, after great consideration, will be pretty generally followed in other States. Still, it can hardly be doubted that the movement for workmen's compensation acts will eventually triumph even if a constitutional amendment is necessary. With characteristic good sense Mr. John Mitchell says:

> I dare say that at the time the Federal Constitution was adopted there were very few men in this country who employed more than one hundred workmen, except perhaps on plantations. At that time master and servant worked together, and there was no danger of accident in connection with the work then performed; and whatever risks there were the employer shared with the workman. Since that time a tremendous revolution has taken place in the relations of employer and employee, and we must have new laws to meet this new situation.

The disadvantages of a rigid written constitution are illustrated by the decision of the Court of Errors and Appeals, the highest tribunal of New York State, declaring unconstitutional the Workmen's Compensation Act, says the London *Law Times*. This measure, it continues, which was passed last year, was modeled closely on the British Act of 1897. It contains a provision making the employer liable for injuries to his workmen resulting from trade risks and not due to his negligence or other fault. This is almost universally regarded as just. The court itself declares it to be good and desirable. But it conflicts with a provision of both the State and the Federal Constitution that nobody should be deprived of his property without due process of law. The beneficent principle of employers' liability must therefore be established not by ordinary legislation but by constitutional amendment. This latter process is practically impossible, as is shown by the current contest over the proposed modifications in the income tax. The decision, which is regarded as one of the most important in many years, is greatly regretted.

Factory Owners Indicted for Loss of Life by Fire.

A NEW YORK grand jury found two indictments, April 11, against each of the two proprietors of the Triangle Waist Company, whose factory was burned out in March with the loss of 145 lives, nearly all of them women and girl operatives. Each of the indicted men is charged with first and second degree manslaughter. A great number lost their lives by jumping from the ninth floor windows to the sidewalk. Bodies of others were found near doors to stairways supposed to provide exits from the workroom, and the indictments charge that these doors were locked, the employees invariably departing by the elevators. A section of the New York labor law provides that "all doors leading in or to any such factory shall be so constructed as to open outwardly where practicable, and shall not be locked, bolted, or fastened during working hours," and a violation of this provision is made a misdemeanor. Under the New York penal law, homicide is manslaughter in the first degree "when committed without a design to effect death . . . by a person engaged in committing, or attempting to commit, a misdemeanor, affecting the person or property, either of the person killed, or of another;" and manslaughter in the second degree "by a person committing or attempting to commit a trespass, or other invasion of a private right, either of the person killed, or of another, not amounting to a crime."

Philosophical Bearings of Fatal Catastrophes.

WHEN numerous employees or railway or steamship passengers suffer death in a disaster which the master or carrier might have prevented, but it is found that he actually omitted no precaution specifically demanded by law, people are apt to exclaim that he is sheltering himself under Shylock's sophistry:

> *Duke.* How shalt thou hope for mercy, rendering none?
> *Shylock.* What judgment shall I dread, doing no wrong?

But the steadier experience of mankind admonishes us against yielding to an impulse of rage, and reminds us of the truth of Mr. Justice Brewer's aphorism: "A

wisdom born after the event is the cheapest of all wisdom. Anybody could have discovered America after 1492." *U. S.* v. *American Bell Telephone Co.*, 167 U. S. 261, 17 Sup. Ct. Rep. 809. "We are all very wise in finding out the causes which have led to particular events, after the events have taken place." *Per* Mr. Justice Washington, in *Marshall* v. *Union Ins. Co.*, 2 Wash. (U. S.) 357, 359, 16 Fed. Cas. No. 9,133 at p. 849, charging a jury. "Wisdom that comes from the contemplation of an event after it has happened is of easy acquirement." *Per* Shiras, J., in *Boland* v. *Combination Bridge Co.*, 94 Fed. Rep. 888, 893. "It is easy to be wise after we see the results of experience." *Per* Mr. Justice Strong, in *Platt* v. *Union Pac. R. Co.*, 99 U. S. 48, 63. "Prophecy after the event is easy prophecy." *Per* Sprague, J., in *Howe* v. *Underwood*, 12 Fed. Cas. No. 6,775 at p. 685. "It is easy to be wise after the event, and it is equally easy after an accident has happened to point out how by this, that, or some other cause it might have been prevented. There are, in fact, few accidents where the means of avoiding them are not within easy reach. But one is not required to be omniscient." *Per* Barker, C. J., in *McBeath* v. *Eastern Steamship Co.*, 39 N. Bruns. 77, 83.

The cries for vengeance uttered by grief-stricken friends and relatives of the victims should not be suffered to lead our judgments astray. In one of his lectures on moral philosophy, delivered to popular audiences in London, Rev. Sydney Smith expatiated upon the inclination to find in the entertainment of vindictive feelings a substantial assuagement of sorrow.

Various Views of the Divorce Problem.

THE day when a uniform divorce law will come into operation is far ahead. A few weeks ago the Governor of Nevada signed a bill passed by the legislature whereby six months of continuous residence in the State, in order to entitle a party to obtain a divorce there, is not in all cases indispensable, temporary absence during the period of waiting anxiety being permitted if necessary. The Philadelphia *Inquirer* suggests by significant allusion that the Nevada legislature reduce the period of residence to "three weeks." By a vote of 19 to 10 the Delaware House of Representatives, March 8, killed a bill to repeal all of the Delaware laws permitting the granting of divorce. "Let us take a step forward and wipe this stain from our statute books, and follow up this act with good marriage laws, placing Delaware in the front rank of the race of pure men and pure women," argued the member who introduced the bill. A bill is pending in the New York legislature — was pending March 17 — making desertion for five years a ground for absolute divorce, adultery being now the sole ground for divorce *a vinculo*. "It is the serious reproach of our existing divorce laws that the relief they grant is practically out of reach of the working classes in this country by reason of expense," said Fletcher Moulton, L. J., in *Harriman* v. *Harriman*, [1909] P. 139. Why not "uplift" the working classes so as to enable them to meet the cost?

Hard Sledding for Lawyers.

WHEN the New York County Lawyers' Association was organized about three years ago upward of three thousand of the 12,130 lawyers in the city signed the roll of membership. The membership committee now reports that 680 have been dropped for nonpayment of dues, which are only $10 a year, and it is said that one-fourth of these men explained that they are unable to make more than a bare living. Doubtless many of them are young men, exhausting themselves in "playing a game they can't beat," and that is what the adoption of an overcrowded profession so often means. "The farming lands of Southern Maryland, lying fallow and inviting; the great mineral resources of Western Maryland and the neighboring West Virginia; the undeveloped and almost unknown territory of some of the Southern and the newer Western States — these are pregnant of opportunity, teeming with promise for intelligent and industrious attention," says the Baltimore *Sun*.

Corporate Monopoly in the Field of Law.

PROTESTS against corporations practicing law in the face of the recent decision of the New York Court of Appeals in the case of *In re Co-operative Law Co.*, 198 N. Y. 479, 92 N. E. Rep. 15, were made at the dinner of the New York County Lawyers' Association at its annual meeting, March 28. J. N. Emley said he had investigated seventeen cases of indemnity companies whose policies provide that the insured must turn over to the insuring company the conduct of his defense in case of litigation. These cases, he said, were only an example of many instances where corporations were not only practicing law, but were practicing in a manner which would be sufficient to disbar an individual so practicing.

At a meeting of the Baltimore Bar Association, March 7, a committee of five was appointed to report upon "the legislation necessary to properly supervise, regulate, and control bodies corporate acting in legal and fiduciary capacities in this State, and to regulate their fees, commissions, and other charges as well as limit their legal powers." One of the speakers said:

"This association is face to face with an important situation. I have been informed that seventy per cent. of the members of this bar are not making a livelihood. I do not believe eighty per cent of the 1,500 or 1,800 members are making $100 a month. Corporations doing our business are working not only to our detriment, but will also ultimately inflict tremendous injury upon the general public. Slowly, but with persistence, the corporations are pushing the lawyers to the wall. They advertise, solicit, and by their corporate influence and wealth monopolize the legal field."

Some members of the Denver, Colo., Bar Association declare that of the 600 lawyers in that city fully one-third are scarcely making a living from the practice of their profession, and it is reported that the law business transacted by corporations will be brought to the attention of the association. "There is no intention to make an hysterical attack upon corporations engaged in the business of lawyers," said one well-known practitioner. "But it is essential that attention be directed toward them, for it is a condition that threatens the existence of our profession and affects our livelihood. Corporations doing our business are working not only to our detriment, but will also ultimately inflict tremendous injury upon the general public. Slowly but persistently these corporations are pushing the lawyers to the wall. They advertise, solicit, and by their corporate influence and wealth monopolize the legal field."

"TRUTH, like all other good things, may be loved unwisely — may be pursued too keenly — may cost too much." Knight-Bruce, V. C., *Pearse* v. *Pearse*, (1846) 1 De Gex & Sm. 28, 29.

"Runner or Capper."

BY the Penal Code of California, § 647, "every person who acts as a runner or capper for attorneys in and about police courts or city prisons" — just the same as, in the same section, "every common prostitute" and "every lewd or dissolute person who lives in and about houses of ill-fame" — "is guilty of vagrancy, and punishable by imprisonment in the county jail not exceeding six months." There is no such provision in the New York Penal Law; the words "runner" or "capper" do not appear in the index to that law. California is the only State, as far as we know, that lets Freedom shriek.

The "Unwritten Law" and "Irregular Equity."

AT Fort Worth, Texas, April 7, a married woman charged with murdering her husband's mistress was acquitted by a jury on the ground of insanity, which in that case was a condition of irresponsibility so characterized by "the unwritten law." In the solemn act of passing upon the guilt of those charged with offenses against the public, the jury represent the majesty of the people as a whole. Judge Dillon said, in one of his lectures before Yale University, that "in the occasional cases where the offender has been almost more sinned against than sinning, but which cannot be anticipated or excepted from the criminal code, and where the offender is consequently technically guilty and a judge would feel bound so to decide, the jury administer an irregular equity, not capable of being defined and formulated, nor of a nature to be expressly sanctioned by the lawgiver, but which satisfies the judgment and conscience of the community without overturning the criminal statute, which still stands intact."

A Defect in Public School Instruction.

IN some of the States the reading of the Bible in the public schools is held to infringe the State Constitution; in others such reading is to some extent, at least, held to be permissible. The cases are collated in 2 Ann. Cas. 522 and 19 Ann. Cas. 235. Since the duty we owe to the Creator is not within the cognizance of civil government, under our constitutions, the chief legitimate use of the Bible in the schools where its reading is allowed is probably for instruction in the rules of morality and good conduct with the resulting benefit to the community at large. There are now sojourning "by request" at various federal institutions a considerable number of financiers whose instruction in the truths of the Bible was not neglected when they were attending school. And Abe Ruef, now at San Quentin, California, has started an evening Bible class. "Ruef is an excellent talker," and "he says the Bible has been his chief reliance in time of trouble," the newspapers tell us. Alabama "captains of industry" who were not deficient in knowledge of moral truths are now kept by the government in "a condition of peonage" (they understand the phrase) at Atlanta. Several bankrupts have been imprisoned for contumacious conduct in bankruptcy proceedings in the United States District Court for the Southern District of New York. Other instances are constantly occurring where men have cause to feel aggrieved because certain rules of conduct prescribed by the State and Federal statutes were not instilled into them at school, and that the pupils were not compelled to mark, learn, and inwardly digest the fact that wealth, social position, or a corps of big lawyers could not be depended on to save them from the penalty of disobedience of those rules. For it is to these rules that people having the public force at their command are prone to resort "in time of trouble," to quote Abe Ruef.

Accident "in the Course of Employment."

IN LAW NOTES for July, 1902, there was an article on "The Crapulous Man and the Law." *Moore* v. *Manchester Liners, Lt.*, [1910] A. C. 498, belongs in the class of cases collected in that article. The English Workmen's Compensation Act allows damages for injuries or death by accident "arising out of and in the course of employment." In the case above cited a seaman employed on a ship in port went ashore after work was over with leave of absence, bought necessaries for himself, and spent some time in drinking and singing with his companions at a public house. On returning to the ship at midnight, while climbing a ladder between the quay and the ship (the only means of communication) he fell into the water and was drowned. The ladder was not fixed, it swayed about, and was "an unsafe contrivance, and particularly dangerous at night to a man who had been drinking," said the County Court judge. The last thing the deceased was heard to say by a companion ahead of him on the ladder was, "I have got the price of a drink for to-morrow night. I have got twenty cents." Then a splash was heard and the man was gone and "was never seen again living or dead." The sadness of the case was measurably relieved by the fact that he departed with "the price" — like Sir John Falstaff, "went away an it had been any christom child," said Hostess Pistol, formerly Mrs. Quickly. Besides, the House of Lords (two lords dissenting) decided that the seaman's widow was entitled to compensation, the accident having occurred "in the course of employment."

Per Lord James of Hereford: "If the deceased man was rightfully away from the ship it would certainly be within his duty, and so within his employment, to return to the ship. He did so by the ladder from which he fell, the only means of reaching the ship provided for him. . . . Moore left the ship for the purpose of obtaining goods which enabled him to carry out his employment; surely an accident occurring during the absence for such purpose arose out of the employment."

Per Lord Mersey, one of the dissenters: "If after finishing the purchases the man began a round of pleasure, the employment would, I think, temporarily come to an end."

Many of our readers will recall the oft-quoted rubric of Judge Heydenfeldt in *Robinson* v. *Pioche*, 5 Cal. 460, sustaining a judgment for the plaintiff, who, while intoxicated, fell into an uncovered hole dug in the sidewalk in front of the defendant's premises: "A drunken man is as much entitled to a safe street as a sober man, and much more in need of it."

Admission of Women to the Bar.

YEARS ago it was vehemently maintained that the admission of women to the bar would contravene "the law of the Creator" (*Bradwell* v. *Illinois*, (1872) 16 Wall (U. S.) 130, 141, *per* Mr. Justice Bradley), "or, for those who deny his existence, the laws of nature" (Application of Mrs. Kilgore, (1884, Phila. Com. Pl.) 14 W. N. C. 255, *per* Ludlow, P. J.). These contentions, if well founded, had the supreme utility of shutting off

further debate. They have not lately been employed as a closure. But other interesting and forceful non-legal arguments for and against the eligibility of women to the bar abound in the reports. (See, for example, 39 Wis. 232, *per* Chief Justice Ryan, denying the application of Miss Goodell; 14 W. N. C. (Pa.) 466, *per* Thayer, P. J., granting the application of Mrs. Kilgore.) It was remarked in a New Hampshire case, not alluding to women, that "secrets involving all that renders life valuable are confided to them [attorneys] upon the mere security and belief that they will not violate a professional confidence." *Bryant's Case,* 24 N. H. 149, 158, *per* Gilchrist, C. J. Mr. Justice Brewer once said "it is the glory of our profession" that "a man may safely go to a lawyer and converse with him upon his rights or supposed rights in any litigation, with the absolute assurance that that lawyer's tongue is tied from ever disclosing it." *U. S.* v. *Costen,* 38 Fed. Rep. 24. In some of the statutes it is declared to be the duty of attorneys "to maintain inviolate the confidence, and at every peril to themselves to preserve the secrets, of their clients." Alabama Civil Code, 1907, § 2985. Curiously enough, in view of the professional duty thus emphatically stated, while courts have gone to the limit of their wits — "where the thread of human reason snaps in sunder" — in quest of arguments against the expediency of admitting women to the bar, it has not occurred to any ingenious and facetious judge to suggest a peculiarly relevant female frailty — according to Shakespeare:

> *Portia.* I have a man's mind, but a woman's might.
> How hard it is for women to keep counsel!
> *Julius Cæsar,* Act II., sc. 4.

Seriously, however, and conceding that members of the legal profession are, as a body, strongly inclined to stand immovable upon the ancient ways or at least are not eager innovators, it is our opinion after careful reading of all reported cases that the technical arguments advanced by judges declining to admit women to the bar, in the absence of specific statutory authority to do so, are sounder in legal reasoning and exhibit greater dialectic skill than the arguments on the other side under substantially the same statutory conditions. By the way, Lecky says "it is impossible to deny" that the books in defense of the belief in witchcraft are not only far more numerous than the later works against it, but that they also represent far more learning and even general ability. (Rationalism in Europe, chap. I.)

"Lawyer Is Cleared as Witness Signaler."

THE foregoing is the caption of a paragraph in a Chicago newspaper. On the recent trial of a personal injury case in that city against a street railway company, the jury having rendered a verdict for the defendant, a motion for a new trial was made on the alleged ground that the defendant's attorney signaled to witnesses when they were testifying. A woman made affidavit that she saw him do it, but she was contradicted by several of the jurors, and the judge concluded that the witness was mistaken.

On the trial of James Watson for high treason, before Lord Ellenborough, three justices, and a jury, (32 How. St. Tr. 227) Sir Charles Wetherell, a brilliant advocate associated with Sergeant Copley for the defense, indulged in some rather cheap pantomime. While Mr. Gurney was conducting the direct examination of the chief witness for the government, who claimed that he was an accomplice of the defendant, the following interruption occurred:

> Mr. Gurney. — Mr. Wetherell, I must object to that; and I must beg it may not be repeated. My lord, I submit that gesticulations of that kind [holding up hands as with surprise] are extremely improper.
>
> Lord Ellenborough. — If the thing is noticed to the court, they must animadvert upon it very severely; that is not a proper way of conducting a cause.

This closed the incident, and the examination was resumed. So it seems that Sir Charles was caught "with the goods." But his client was acquitted, much to the chagrin of Lord Ellenborough.

Federal Circuit Courts Not Miserly of Jurisdiction.

IT has been frequently asserted that federal courts are covetous of jurisdiction. The following figures indicate that there is — perhaps "has been" would be the more accurate expression — good ground for the charge, but only against the Circuit Courts. In *Regis* v. *United Drug Co.,* 180 Fed. Rep. 201, a removal case on the alleged ground of separable controversy, conditionally remanded, Judge Lowell cites a long list of Supreme Court cases and then says: "Since 1875 (in effect about 100 U. S.) no appeal has lain from a remand to the State court made by the Circuit Court. Of the cases above cited, some thirty-seven came to the Supreme Court from the Circuit Courts which had allowed removal on the ground that the controversy was separable, decisions usually reached after mature deliberation. In only four of these thirty-seven cases did the Supreme Court fail to hold that the Circuit Court erred, that the controversy was inseparable, and that the case should have been remanded." And yet — strangely enough, in view of the foregoing statistics — it is a well-recognized maxim in the Circuit Courts that "cases in which our jurisdiction is in doubt should be remanded to the court from which they are removed," and "it is only where jurisdiction is clear that we hold cases under the removal acts." *Per* Aldrich, J., in *Concord Coal Co.* v. *Haley,* 76 Fed. Rep. 883.

NEW YORK WORKMEN'S COMPENSATION ACT UNCONSTITUTIONAL.

The Case Stated.

ONE of the most important decisions that have been rendered in the last several years is that of the New York Court of Appeals in *Ives* v. *South Buffalo R. Co.,* (N. Y.) 94 N. E. Rep. 431, opinion delivered March 24, declaring that the "Workmen's Compensation Act" passed by the New York legislature in 1910 is an infringement of the Federal and the State Constitutions. Since the decision is *against* the constitutionality of the law, it is conclusive, and under U. S. Rev. Stat., § 709, 4 Fed. Stat. Annot. 467, the judgment is not reviewable by the United States Supreme Court on a writ of error.

The New York Act of 1910, providing for "workmen's compensation in certain dangerous employments," enumerated eight classes of employments "hereby determined to be especially dangerous," and among these was "the operation on steam railroads of locomotives, engines, trains," etc. Ives was a switchman on the steam railroad

of the defendant corporation and sued for injuries "arising out of and in the course of the employment," demanding judgment for compensation under the provisions of the act. The unconstitutionality of the act was pleaded in the answer and a demurrer to the defense was sustained by the Special Term of the Supreme Court (68 N. Y. Misc. 643, 124 N. Y. Supp. 920), which thereupon rendered final judgment for the plaintiff, and, by a divided court, this judgment was sustained by the Appellate Division. 140 N. Y. App. Div. 921, 125 N. Y. Supp. 1125. It is now reversed by the Court of Appeals.

The Workmen's Compensation Act made the employer liable where "personal injury or accident" in either of the enumerated dangerous employments, "arising out of and in the course of the employment, . . . is caused to any workman employed therein, in whole or in part, or the damage or injury caused thereby is in whole or in part contributed to by, . . . a necessary risk or danger of the employment or one inherent in the nature thereof; . . . provided that the employer shall not be liable in respect of any injury to the workman which is caused in whole or in part by the serious and wilful misconduct of the workman." The act also prescribed a "scale of compensation;" for example, in the case of total or partial incapacity resulting from the injury, "a weekly payment commencing at the end of the second week after the injury and continuing during such incapacity . . . equal to fifty per centum of his average weekly earnings when at work on full time during the preceding year," etc. The act proceeded to authorize an action for damages. "Such action shall be conducted in the same manner as actions at law for the recovery of damages for negligence. The judgment in such action if in favor of the plaintiff shall be for a sum equal to the amount of payments then due and prospectively due under this article."

In the case at bar, it was not contended that the plaintiff, Ives, had been guilty of serious and wilful misconduct, nor did the plaintiff allege that the defendant had in any manner failed to exercise due care or failed to comply with any law affecting the employment; the plaintiff's complaint alleged only (in the language of the statute) that he was injured solely by reason of "a necessary risk or danger of the employment." The principal opinion holding the statute unconstitutional was written by Judge Werner, in which Chief Judge Cullen and all the other members of the court concurred; and Chief Judge Cullen filed a separate short opinion, in which Judge Bartlett concurred. Almost every word of the following comments is the language of Judge Werner.

Revolutionary Character of the Act.

The New York Act is modeled upon the English Workmen's Compensation Act of 1897, which has since been extended so as to cover every kind of occupational injury. Our statute, judged by common-law standards, is revolutionary. Under the common law an employer is liable to his injured employee only when the employer is at fault and the employee is free from fault; while under the new statute the employer is liable, although not at fault, even when the employee is at fault, unless the latter's fault amounts to serious and wilful misconduct. Fault on the employee's part is no longer an element of his right of action. This change necessarily and logically carries with it the abrogation of the "fellow servant" doctrine, the "contributory negligence" rule, and the law relating to the employee's assumption of risks. There can be no doubt that the first two of these are subjects clearly and fully within the scope of legislative power, and that, as to the third, this power is limited to some extent by constitutional provisions.

Reserved Power over Charters Not Involved.

The defendant argues and the plaintiff admits that the statute cannot be upheld under the reserved power of the legislature to alter and amend charters. Nowhere in the act is there any reference to corporations. The liability sought to be imposed is based upon the nature of the employment and not upon the legal status of the employer. It is therefore unnecessary to decide how far corporate liability may be extended under the reserved power to alter or amend charters, except as that question may incidentally arise in considering the police power of the State.

Classification Not Objectionable.

The classification in the statute of a limited number of employments as dangerous is not fanciful or arbitrary, and is not repugnant to that part of the Fourteenth Amendment to the Federal Constitution which guarantees to all our citizens the equal protection of the laws.

Constitutional Right to Jury Trial.

The New York Constitution provides that "the trial by jury in all cases in which it has been heretofore used shall remain inviolate forever." If the statutory provisions relating to compensation are to be construed as definitely fixing the amount which an employer must pay in every case where his liability is established by the statute, there can be no doubt that they constitute a legislative usurpation of one of the functions of a common-law jury; for it is as much the right of a defendant to have a jury assess the damages claimed against him as it is to have the question of his liability determined by the same body. This part of the statute has given rise to conflicting views among the members of the court, and, since the disposition of the questions which it suggests is not necessary to the decision of the case, the court does not decide it.

Due Process of Law.

But the legislation is challenged as void under the Fourteenth Amendment to the Federal Constitution and under section 6, article 1, of the New York Constitution, which guarantee all persons against deprivation of life, liberty, or property without due process of law. The several industries and occupations enumerated in the statute are concededly lawful, and therefore under the constitutional protection. One of the inalienable rights of every citizen is to hold and enjoy his property until it is taken from him by due process of law. When our constitutions were adopted, it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another, and the liability imposed by the new statute constitutes a deprivation of liberty and property under the Federal and State Constitutions, unless its imposition can be justified under the police power.

Limitation of the Police Power.

If it is competent to impose upon an employer, who has omitted no legal duty and has committed no wrong, a liability based solely upon a legislative fiat that his busi-

ness is inherently dangerous, it is equally competent to visit upon him a special tax for the support of hospitals and other charitable institutions, upon the theory that they are devoted largely to the alleviation of ills primarily due to his business. The English authorities are of no assistance to us, because in the King's courts the decrees of the Parliament are the supreme law of the land, although they are interesting in their disclosures of the paternalism which logically results from a universal employer's liability based solely upon the relation of employer and employee, and not upon fault in the employer. Among the American cases which clearly state the legal principles applicable to the case at bar are those arising under statutes passed by different States imposing upon railroad corporations absolute liability for killing or injuring upon their rights of way, horses, cattle, etc., by running over them, in which this liability was held to constitute a deprivation of property without due process of law; although a different interpretation has been given to statutes imposing upon railroad corporations the duty to fence their rights of way, under which the liability is imposed for failure to obey the command of the statutes. The learned counsel for the plaintiff ignores, or at least misses, the vital distinction between legislation which imposes upon an employer a legal duty, for the failure to perform which he may be penalized or rendered liable in damages, and legislation which makes him liable notwithstanding he has faithfully observed every duty imposed upon him by law. When an industry or calling is *per se* lawful and open to all, and therefore beyond the prohibitive power of the legislature, the right of governmental control is subject to such reasonable enactments as are directly designed to conserve health, safety, comfort, morals, peace, and order. *Lochner* v. *New York,* 198 U. S. 45, 25 Sup. Ct. 539, 49 L. ed. 937. For the failure of an employer to observe such regulations, the legislature may unquestionably enact direct penalties or create presumptions of fault which, if not rebutted by proof, may be regarded as sufficient evidence of liability for damages. That must be the extreme limit of the police power, for just beyond is the Constitution, which, in substance and effect, forbids that a citizen shall be penalized or subjected to liability unless he has violated some law or has been guilty of some fault.

Doctrines and Cases Distinguished.

Cases are cited in support of the contention that the common law and the New York statute furnish many illustrations of legal liability without fault; but by analysis they will be found to be inapplicable to the questions now before the court. Such, for instance, are the supposed analogies of the law of deodands, the common-law liability of the husband for the torts of his wife, the liability of the master for the acts of his servant, and the liability of a ship for the care and maintenance of sick or disabled seamen. Great reliance is also placed upon the case of *St. Louis, etc., R. Co.* v. *Mathews,* 165 U. S. 1, 17 Sup. Ct. 243, 41 L. ed. 611, in support of the contention that there may be liability where there is no delinquency, but that decision is amply supported by a number of reasons which have no application to the controversy at bar. As to the cases of *Noble State Bank* v. *Haskell,* 219 U. S. 104, 31 Sup. Ct. 186, 5 L. ed. 000, and *Assaria State Bank* v. *Dolley,* 219 U. S. 121, 31 Sup. Ct. 189, 55 L. ed. 000, we have only to say that if they go so far as to hold that any law, whatever its effect, may be upheld because by the "prevailing morality" or the "strong and preponderant opinion" it is deemed "to be greatly and immediately necessary to the public welfare," we cannot recognize them as controlling our construction of our own Constitution. That the business of banking in the several States may be regulated by legislative enactment is too obvious for discussion. That the extent to which such State legislation may be carried must depend upon the difference in constitutional provisions is also plain. How far these late decisions of the federal Supreme Court are to be regarded as committing that tribunal to the doctrine that any citizen may be deprived of his private property for the public welfare we are not prepared to decide. All that is necessary to affirm in the case before us is that in our view of the Constitution of our State the liability sought to be imposed upon the employers enumerated in the statute before us is a taking of property without due process of law, and the statute is therefore void.

Chief Judge Cullen's Concurring Opinion.

The act is general, not confined to corporations, and even if it were, its effect would be a deprivation of property not authorized by the reserved power to regulate. As to corporations hereafter formed, the question is very different. The franchise to be a corporation is not one inherent in the citizen, but proceeds solely from the bounty of the legislature, and for that reason the legislature may dictate the terms on which it will be granted and require the acceptance of the provisions of this act as a condition of incorporation. Even in the case of existing corporations, the corporate existence of all those created since the Constitution of 1846 may be revoked by the legislature, though the property rights of such corporations and their special franchises other than the one to be a corporation cannot be impaired. The property and franchise would have to be managed by the owners as partners or tenants in common, and the legislature might require as a condition of the continued right to be a corporation that before the expiration of a reasonable period the provisions of the statute should also be accepted by them. But individual citizens following the ordinary vocations of life, asking no favors of the government, whether a corporate or other franchise, but only the protection of life and property, which every government owes to its citizens, and guilty of no fault, cannot be compelled to contribute to the indemnity of other citizens who, by misfortune or the fault of themselves or others, have suffered injuries, except by the exercise of the power of taxation imposed on all, at least of the same class, for the maintenance of public charity — not referring, of course, to obligations springing from domestic relations.

"Words of endearment contained in love letters are never to be taken literally. The extravagant use of such words, therefore, cannot be held to conclude the defendant to their literal meaning, even if he did write them. If that were so, the plaintiff, with equal propriety, might be held to be absolutely concluded by the use of her maiden name in indorsing defendant's checks. In a case of this kind the court is bound to look below the surface of appearances." *Per* Mr. Justice Freedman in Bates *v.* Bates, 7 N. Y. Misc. 547, 27 N. Y. Supp. 872, holding alleged common-law marriage was not proved.

PROPOSED ANTE-MORTEM PROBATE OF WILLS.

THE writer hereof, who was the author of "Probate and Contest of Wills," vol. 16 Encyclopædia of Pleading and Practice, is chagrined to find that in preparing his article on "Proposed Ante-Mortem Probate of Wills" in LAW NOTES for last month he overlooked the case of *Lloyd* v. *Wayne Circuit Judge*, (1885) 56 Mich. 236, 23 N. W. Rep. 28. Former Attorney-General Pillsbury writes that he drew the bill introduced in the Massachusetts legislature without knowledge of the case or the Michigan statute, although he had caused the legislation of all the States to be examined. We quote again the entire text of the Massachusetts bill:

"Any will or codicil may, at the option of the testator, be offered for proof and proved in his lifetime, in the same manner and under the same conditions provided by law in the case of the will of a deceased testator, except that no appeal shall lie from the decree of the Probate Court thereon. The attestation of witnesses shall not be essential to the validity of any will or codicil so offered for proof. Upon the death of the testator a will or codicil so proved, if not then revoked in accordance with law, shall take full effect as his last will or codicil without further proceedings, and its validity as such shall not thereafter be drawn in question in or by any other proceeding."

In the Michigan case above cited, a testator had presented his will to the Probate Court for probate and allowance in his lifetime under the provisions of a statute enacted in 1883. The leading object of the will appears to have been to exclude one son, and also the testator's wife, so far as it was within his power, from all share in the distribution of his estate. The Probate Court held that the act was unconstitutional, chiefly because it failed to make provision for notice to the wife and an opportunity for her to be heard. The Supreme Court also held that apart from the interest of a wife in her husband's estate, she has, by statute, the first right to administer upon his estate, "which is an important and substantial right," and a right to nominate a guardian for her children under the age of fourteen, and therefore, that "the wife should have an opportunity to be heard, if she alleges that a will not made freely or with due competency is being offered for probate." Chief Justice Cooley said:

"But it may be said that these rights of the widow and mother are not property rights, and therefore not protected by the Constitution, but may be taken away by the legislature at pleasure. It is to be observed, however, that the legislature does not profess to take them away; they remain nominally protected by the law, and the Act of 1883 is expected to have effect while preserving them. The difficulty, then, is that the Act of 1883 makes no sufficient provision whereby, in the case of a married man, it can be carried into effect consistently with the preservation of rights which were before given, and which must be supposed to have been intended should remain. It therefore makes no sufficient provision for its own enforcement without conflict with other statutes not meant to be repealed, and is inoperative for that reason."

But the principal ground for pronouncing the statute unconstitutional was that the probate was not a judicial proceeding, nor the order to be made therein a judgment, since "it will at all times be subject to his [testator's] own discretion or caprice." Concluding his brief consideration of this point, Chief Justice Cooley said he knew of no authority for requiring the court below to take cognizance of cases not properly judicial, "and to give its time and attention to the making of orders which are not judgments, and which the party seeking and obtaining them is under no obligation to leave in force for a day or an hour." Sherwood and Champlin, JJ., concurred, without opinions. Campbell, J., concurred in a separate and very interesting opinion. The greater part of his opinion is as follows:

"The case is one where we can get no help from similar precedents, as the statute is new and singular. Judicial proceedings to probate a will while the testator is living are unheard of in this country or in England; and inasmuch as the statute only makes the decree effective in the single case of the establishment of the will and subsequent death without revocation or alteration, and leaves it open to the testator to make any subsequent arrangement which he may desire, or to oust the jurisdiction by change of residence, or to leave the will once rejected open to probate in the usual way after death, the proceeding is still more anomalous. I am disposed to think, with the circuit judge, that this is not in any sense a judicial proceeding which he was bound to consider or entertain. . . . I cannot conceive it possible that a proceeding can be dealt with as judicial when the chief party to it will not be precluded by the decree from doing exactly as he might have done had the court never been called on to act at all. This statute, which was probably designed to prevent the unseemly and disgraceful attempts, too often made, to defeat the enforcement of the last will of persons whose competency to deal with their own affairs was never doubted or interfered with, has been so drawn as to remove none of the difficulties, but rather to make them worse. It is a singular, and in my judgment a very unfortunate, spectacle to see a man compelled to enter upon a contest with the hungry expectants of his own estate, and litigate while living with those who have no legal claims whatever upon him, but who may subject him to ruinous costs and delays in meeting such testimony as is apt to be paraded in such cases. The practice which has usually prevailed in civil-law countries, and also is said to have been customary in various parts of England (see Seld. Ecc. Jur. Test. 5), of having wills executed or declared in solemn form, or acknowledged before reputable officers and a sufficient number of disinterested witnesses to render it unlikely that the testator is not acting with capacity and freedom, has been approved by the continued experience of most countries, and has saved them from the *post mortem* squabblings and contests on mental condition which have made a will the least secure of all human dealings, and made it doubtful whether in some regions insanity is not accepted as the normal condition of testators. There is no sensible reason why a will which is always revocable and contingent should not be established, presumptively at least, by such an acknowledgment as will suffice to prove a deed which is irrevocable; and where, as is usually the case abroad, such an acknowledgment is made before trustworthy officers, in the presence of known and reputable witnesses, and in the enforced absence of all other persons, the security against incapacity and incompetency is quite as strong as can be found in a contest before a court or jury that never saw the testator. A man's incapacity, if it exists, will not easily escape the notice of his disinterested friends and neighbors, and when they certify to his competency and freedom of action with their attention directly called to their own responsibility in doing so, they are seldom mistaken, and those who seek to impugn their action, if allowed to do it at all, should be compelled to assume the burden and risk themselves. But this is not judicial action. In the proceedings of various kinds familiar in England, where conveyances are made effective by acknowledgment and enrolment before various classes of public officers or tribunals, it was never deemed proper or necessary to bring general heirs presumptive before the acknowledging officer, in order to give efficacy to transfers in fee simple, either of man or woman, although they are as clearly affected in their prospects of inheritance as they would be by a will. . . . The broadest definition ever given to the judicial power confines it to controversies between conflicting parties in interest, and such can never be the condition of a living man and his possible heirs. Our statutes have never undertaken, and do not in this case undertake, to give to the heirs any interest which will ever be fixed by this probate, or which may not be cut off at any

time by their own death, or by [testator] by new will or conveyance. It is by no means free from doubt what classes of probate proceedings under our system are to be treated as judicial proceedings in the proper sense of that term; and it is not important here to consider that question, because this proceeding is not even a suit for probate. There has never been any proceeding known to our laws for the mere purpose of establishing the will even of a deceased person. The probate of wills under our statutes is merely a part of the proceedings to administer the estates of deceased persons in the court that has jurisdiction and charge of such estates. This rule is so general that in some states devises are not probated at all, and in some the probate is not conclusive, because controversies concerning land are usually tried in other courts. We have enlarged the jurisdiction in probate so as to reach lands for some purposes, and have made all wills subject to probate. But there is no case where an original probate can be granted here, except in the court having jurisdiction over the estate; it cannot be done separately. This statute does not attempt to change the place of ultimate probate, and it does not make a decree against the will either a bar or even admissible to prevent future probate after death. It makes no provision for making a finding either way evidence for any purpose during testator's life, so as to negative testamentary capacity, or otherwise to affect him. And it has no force for any purpose so long as he lives. I am of opinion that the statute is inoperative, as not within any recognized judicial power."

It is to be observed that the proposed Massachusetts act, by assimilating the proceeding to an application for probate after death, does contemplate notice to those who would be interested if the testator were dead at the time of the application under the act. In view of the maxim *nemo est hæres viventis* it would seem that this is enough. Furthermore, unlike the Michigan statute, (?) it expressly makes the decree of the probate court conclusive.

It may very well be that the trial of a hypothetical case is not a constitutional function of a court of law. See, for example, *Foreman* v. *Board, etc.*, 64 Minn. 371. And it is a familiar practice of courts, especially of appellate courts, to dismiss a case where the controversy has become, as the phrase goes, "a moot case." Thus, in *Glasgow Nav. Co.* v. *Iron Ore Co.*, [1910] A. C. 293, the House of Lords dismissed an appeal in a case which was apparently fictitious. But unless the court in the Michigan case intended to decide otherwise, we should incline to think that a proceeding by a testator for the probate of his own unrevoked will would be entitled to a better standing than his application for probate of a will that he had already revoked. We can think of cases where a party has a *locus standi*, although the court is perfectly aware that the ruling it is about to make in his favor may be immediately rendered nugatory by his own act. For instance, suppose a defendant's demurrer for want of jurisdiction is overruled; the plaintiff may thereupon dismiss his suit, leaving the judge with his labor for his pains.

The Massachusetts Constitution provides that "each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices of the Supreme Judicial Court, upon important questions of law, and upon solemn occasions." Under this provision the legislature has obtained advisory opinions as to the constitutionality of proposed acts (see 6 Am. & Eng. Encyc. of Law (2d ed.) 1068 *et seq.*), and we suppose an opinion can thus be secured in regard to the validity of the provisions in the bill now pending for ante-mortem probate of wills.

CHARLES C. MOORE.

JURY TRIALS IN CONTEMPT CASES.

A BILL pending in the Massachusetts legislature that has aroused wide interest among members of the bar in that State provides as follows:

"The defendant in proceedings for violation of an injunction, where it appears from the petition filed in court alleging the violation, that the violation is an act which also would be a crime, shall have the right to trial by jury on the issue of fact only, as to whether he committed the acts alleged to constitute the said violation, and the said trial by jury shall take place forthwith, and if there be no sitting of a jury in the county where the contempt proceedings are to be heard, a venire shall issue to impanel a jury forthwith."

Twelve Boston lawyers headed by Richard Olney sent to one of the legislators a letter protesting against the bill, and subsequently Mr. Olney with Moorfield Storey and other leading lawyers sent a brief to every member of the House of Representatives calling attention to what they consider the "objectionable character" of the pending measure. They point out that injunctions to prevent the foreclosure of mortgages, to enforce the execution of valid trusts, to compel specific performance of contracts, to secure fair disposition of partnership property, and the like, may still be issued, and if the defendant violates the injunction he is not entitled to trial by jury. "It results," they continue, "that a defendant who is guilty only of a civil offense may be punished promptly by the court, while a defendant whose offense amounts to a crime is given the respite and chances of a jury trial. This would seem to be a direct invitation to add crime to acts which would otherwise be merely a contempt. By far the larger number of injunctions in this commonwealth are issued to prevent the maintenance of public and private nuisances, and to assist boards of health, water boards, building commissions, and other public bodies in enforcing the laws of the commonwealth and their own regulations. Practically all offenses against such laws and regulations are crimes, and therefore defendants would under this act be entitled to a jury trial before orders issued against them could be enforced. . . .

"In many sections of the State the only way to get rid of nuisances and to protect the community is by application to the court in equity. Every one in any way concerned with obnoxious property, or its use, their agents, employees, and servants, can be made subject to the injunction, and no transfer of property or management can thwart the intentions of the law. It is now proposed to undo all this and interpose a jury trial between the orders of the court and their actual enforcement, and to give property owners and lessees the delay and chances of a jury trial. To what extent defendants would take advantage of this opportunity it is impossible in advance to determine, but it is safe to say that many injunctions would be violated which are now obeyed. . . .

"It is asserted that the judge who issues the injunction makes the accusation in proceedings for contempt and so sits as judge in his own case. The judge does not make the accusation. The petition for attachment for contempt is made by the party who is injured by the violation of the injunction, and the judge hears that petition as he does any other proceeding."

The bill passed the Senate and on March 22, by a vote of 81 to 32, was ordered to a third reading in the House. Senator Roger Sherman Hoar stood as sponsor for the bill, and rested much on the position he supposed to have

been taken by Professor Wambaugh of the Harvard Law School. Thereupon the professor said that "so far from indorsing the Hoar bill, he believed it to be an unwise attempt to deal with a question which can much better be dealt with by other means," and that he does not wish to be quoted as supporting the bill.

Massachusetts newspaper editors are not in accord as to the merits of the bill. "Unless the experience of the ages has reached the wrong conclusion," says the Worcester *Post*, "now accepted in some form or degree in nearly every civilized land, that the jury system is on the whole the best way of reaching justice, jury trial is as proper in this class of cases as any other." And it concludes that "argument like that of these lawyers" — Mr. Olney and others — is "a curious example of the capacity of able men for twisted thinking." *Per contra*, the Fall River *News*, under the caption "Hamstringing the Courts," says:

"The Hoar scheme might well be desired by unscrupulous corporations rich enough to defy the ordinary slow processes of criminal law for many years, but it would be a grave menace to the welfare of the people. The injunction operates quickly for the protection of property rights; but if an injunction could be defied with impunity, until the end of the slow process of a jury trial, the mischief which it was sought to prevent by the injunction might easily be accomplished pending the conclusion of the trial."

There is little doubt that a Massachusetts jury could be trusted to execute the power wisely if it is prudent to confer it upon a jury in any community.

Observations Here and There.

"CHANTECLER" is a cross-reference title in the American Digest, vol. 9 (for 1910), and "Craps" is a cross-reference title in vol. 8.

Liquor containing a little over one-half per cent. of spirits may be an intoxicating liquor under the Canada Temperance Act. King *v.* Kay, 39 N. Bruns. 129, sustaining a conviction for selling it.

"I know that it has been said by a distinguished judge 'that illustration is not argument,' but at times it is at least a very convenient substitute for it." *Per* Cullen, J., in Skinner *v.* Norman, 165 N. Y. 571.

Perhaps the first word of the following sentence ought to have been italicized: "Respectable insurance companies are not, both on the grounds of honesty and self-interest, in the habit of disputing, or in the least likely to dispute, honest claims." *Per* Lord Justice Kennedy, in King *v.* Phœnix Ins. Co., [1910] 2 K. B. 672.

We frequently see a case cited as "on all fours" or *quattuor pedibus* with the case at bar. Here is an excellent use of a similar phrase: "The present seems to be an *a fortiori* case," said the court, in The Gladys, [1910] 17, after citing another case and the holding therein.

In Aldridge *v.* Com., 2 Va. Cas. 447, decided in 1824, the first headnote is as follows: "An indictment for grand larceny charged the goods to have been stolen on the 21st December, one thousand eight hundred and twenty-*thee*, leaving out the *r* in the last word. This is cured by the statute of jeofails." Tell it not in Columbia, Mo.

"It certainly is a most remarkable thing that a point should at the present time arise as to the construction of the statute of frauds, which apparently has never in terms been decided during the 200 years which have elapsed since the passing of the statute," said Judge Bray, in the King's Bench Division in Reeve *v.* Jennings, [1910] 2 K. B. 522, 525.

Let a lawyer whose practice is remote from salt water and who never had a case involving maritime matters guess what the letters mean in the following cabalistic phrase in a marine insurance slip: "f. p. a. and loss unless caused by s. s. b. and c." Well, they mean, respectively, "free from particular average" and "stranding, sinking, burning, and collision." Otago Farmers', etc., Assoc. *v.* Thompson, [1910] 2 K. B. 145.

In vol. 126 New York Supplement, judgments of the Municipal Court in the several districts of the borough of Manhattan were reversed by the Supreme Court in forty-four cases and affirmed in only fourteen cases. Judgments of the New York City Court, Trial Term, were reversed in nineteen cases and affirmed in four cases. Young practitioners in those lower courts evidently get a lot of encouragement as well as fun. For if they win there, very well; if they lose, the chances are from three to five in their favor on appeal.

In Lord Campbell's "Lives of the Chief Justices," vol. 3, p. 140 (Cockcroft's ed.), he says that Chief Justice Holt when practicing at the bar in civil cases, eager for victory, seems not to have been very scrupulous as to the arguments he urged, "but — according to the American phrase, now naturalized in Westminster Hall — to have 'gone the whole hog.'" Chicago? No; for the "Lives" was written between 1846 and 1850, whereas there were only four schoolhouses in Chicago in 1847, but an annual importation of over 8,000,000 head of hogs for the decade ending with 1900.

All the English official reports are now printed under the direction of "the incorporated council of law reporting." Consequently, we find "I daresay" in the opinion of Hamilton, J., in [1909] 2 K. B. 154, in that of Sir John Bigham in [1910] P. 33, and in that of Sir Gorell Barnes in [1909] P. 40. We "daresay" the word was not so written by either of those judges. It is not in Stormonth's English Dictionary, nor in Webster, the Century, or the Standard, — nor in Munson's Dictionary of Practical Phonography, although "I dare say" is, of course, a good shorthand "phrase."

In Moel Tryman Ship Co. Lt. *v.* Andrew Weir & Co., [1907] 2 K. B. 844, 847, Judge Bray says: "There was a further decision in the year 1906 in the American courts in the case of Karran *v.* Peabody," etc., and the footnote is "(1906) 145 Fed. Rep. 166 (C. C. A.)." Do the members of the "incorporated council" think that "C. C. A." stands for "Circuit Court of America"?

Where a will is made in terms subject to the happening of an event, that event must occur before it can be operative; whereas, if the possibility of an event happening is stated merely as the reason for making the will, the will becomes

operative whether the event happen or not. "To give an illustration: If a man write, 'should I die to-morrow, my will is' so and so, his death must occur to make the document operative; whereas if he writes, 'lest I die to-morrow,' it will be operative whether he die or not on the morrow." *Per* Bigham, P., in Vines *v.* Vines, [1910] P. 150.

"Official reports indicate that in the year ending June 30, 1910, the railroads of the country have in their operation killed 3,804 and wounded 82,374. The loss at Gettysburg was for the Union 3,072 killed and 14,497 wounded, or 17,569 in all; for the Confederates, the killed there were 2,592 and the wounded 12,709, in all 15,311. The aggregate killed and wounded of both armies was 32,880. So that death and wounds on the railroads of this country are in one year more than two and one-half times as numerous as the loss on both sides from deaths and wounds at Gettysburg." *Per* Speer, J., in note to U. S. *v.* Atlantic Coast Line Co., 182 Fed. Rep. 285.

In Perry *v.* House of Refuge, 63 Md. 20, 25, where a question of law arose which had never been settled by adjudication in Maryland, and in an examination of authorities introduced from exterior sources the court was confronted by some diversity of opinion, Judge Yellott said:

"When, in the absence of light, to be derived from domestic adjudication, this court is embarrassed by an antagonism in the rulings, emanating from other jurisdictions, it must necessarily, by an eclectic method of appropriation, select, adopt, and be governed by, such decisions as are in consonance with that sound reason, which is said to be the life of the law, and which, therefore, affords the safest and most solid basis for a judicial determination."

The preface in Minor (Ala.) report is dated May 14, 1829. The author's concluding paragraph gives us an interesting glimpse of certain conditions then existing: "The printing being executed in New-York, more than seven hundred miles from my residence, I could not examine it, and make corrections as it progressed, without a delay of several months in the publication, and at a time when it may be necessary to refer to the volume at almost every term of our courts. I have endeavoured to supply the seemingly urgent demand of the profession and the public for information as to the judicial decisions of the State. I must ask for their liberal indulgence for the imperfections of the work."

This resolution was passed in Arkansas in 1881, and is printed in a front page of Kirby's Dig. Ark. Stat.:

Be it therefore resolved by both houses of the general assembly, That the only true pronunciation of the name of the State, in the opinion of this body, is that received by the French from the native Indians, and committed to writing in the French word representing the sound; and that it should be pronounced in three syllables, with the final "s" silent, the "a" in each syllable with the Italian sound, and the accent on the first and last syllables — being the pronunciation formerly universally, and now still most commonly used; and that the pronunciation with the accent on the second syllable with the sound of "a" in *man,* and the sounding of the terminal "s," is an innovation, to be discouraged.

A newspaper proprietor publishes of an individual: "This is the same John Smith who got himself into serious trouble when he was in Arizona three years ago. Horse stealing is not popular in that community." This allocation may enrage John Smith. The newspaper man may safely assume, however, that any court will take judicial notice of the fact that horse stealing is not popular in Arizona or even elsewhere, said Judge Lacombe; and he may be able to prove that, when John Smith was in Arizona at the time stated, he insisted on riding a half-broken horse, was thrown in an unfrequented part of an alkali desert, broke his leg and lay there two days before he was rescued. "But," continued the judge, "ability to prove the occurrence of such serious trouble would be no justification of the statement which the article by indirection conveyed, that John Smith when in Arizona was discovered to be a horse thief." Mann v. Dempster, (C. C. A.) 181 Fed. Rep. 76, 81, where a verdict against *Town Topics* in an action for libel was affirmed to the extent of $20,000.

Does the beginning of an attempt constitute an attempt in itself? It may. Thus, the putting of poison into a beverage and giving it to another person to drink, the amount of poison being insufficient to cause death, but the intention being to repeat the dose from time to time so as to kill by slow poison, would be an attempt to murder although the beverage remained untouched. "It might be the beginning of the attempt, but would none the less be an attempt." *Per* Bray, J., in Rex *v.* White, [1910] 2 K. B. 124, 130. The judge spoke of "having the advantage of hearing a most able argument from Mr. Maddocks," for the defendant, which, however, did not prevail. Here is a part of the argument of Mr. Maddocks:

"Even on the assumption that the prisoner put the poison in the glass in contemplation of causing his mother's death at a future date by administering a series of doses in the belief that they would have a cumulative effect upon the recipient, the act did not amount to an attempt, for it was not done with an intent then and there to kill. The form of indictment for administering poison invariably alleges that the poison was administered 'with intent thereby *then* feloniously . . . to kill and murder.' And the evidence showed that the quantity of cyanide in the glass was not sufficient to kill. He had a *locus pœnitentiæ,* and might have changed his mind before he had administered sufficient to cause death."

Cases of Interest.

Divorce Decree Entered Nisi No Bar to Another Suit in Different State. — In Drake *v.* Drake, (N. H.) 78 Atl. Rep. 1071, the court held that it was no bar to an action for divorce brought by the husband in New Hampshire that the wife had previously brought an action for divorce in Massachusetts and that a decree *nisi* had been entered in her favor. The ground of the decision was that the decree *nisi* did not dissolve the marriage, but left the dissolution contingent on the entering of an absolute decree which was the only decree that could be considered a bar to another action in a different State.

Acts of Agent for Two Corporations as Constituting Conspiracy. — In United States *v.* Santa Rita Store Co., (N. M.) 113 Pac. Rep. 620, it was held that while a conspiracy might be formed by two corporations acting through agents it could not be formed by the acts and thoughts of one person acting as the agent of two corporations. The court cited as authority for its decision the case of Union Pac. Coal Co. *v.* United States, 173 Fed. Rep. 737, wherein Sanborn, J., said: "The union of two or more persons, the conscious participation

in the scheme of two or more minds, is indispensable to an unlawful combination, and it cannot be created by the action of one man alone."

UNLICENSED PHYSICIAN HOLDING HIMSELF OUT AS "DOCTOR" WITHOUT REMEDY FOR BEING CALLED QUACK AND CHARLATAN. — In Lathrop *v.* Sundberg, (Wash.) 113 Pac. Rep. 574, it was held that a person practicing as a physician without a license, and having upon his office door the words "Dr. C. F. Lathrop, Osteopathic Physician," in violation of a statute making it a misdemeanor, punishable by a fine or imprisonment or by both, for a person to maintain "an office or place of business with his or her name and the words . . . 'Doctor' in public view" without having obtained and filed a license as provided by law, could not successfully maintain an action of libel against persons who he claimed had charged him in a newspaper article with being a quack and charlatan, thereby injuring his business; the general rule being laid down that a litigant will not be permitted to recover damages because he has been prevented from pursuing his business in violation of the laws of the State.

STRIKE TO COMPEL RECOGNITION OF UNION ENJOINED. — In Folsom *v.* Lewis, (Mass.) 94 N. E. Rep. 316, a strike by the Boston Photo-Engravers' Labor Union against all the non-union employers of photo-engravers in Boston to compel such employers to recognize the union as such and to employ none but union men, or non-union men provided they should join the union within thirty days, was enjoined. Knowlton, C. J., said: "Conduct directly affecting an employer to his detriment, by interference with his business, is not justifiable in law, unless it is of a kind and for a purpose that has a direct relation to benefits that the laborers are trying to obtain. Strengthening the forces of a labor union, to put it in a better condition to make its claims in controversies that may afterwards arise with employers, is not enough to justify an attack upon the business of an employer by inducing his employees to strike."

JURISDICTION OF MUNICIPALITY OVER TERRITORY FOR TAXING PURPOSES NOT ACQUIRED BY PRESCRIPTION. — In Inhabitants of Eden *v.* Pineo, (Me.) 78 Atl. Rep. 1126, which was an action of debt brought by the inhabitants of Eden against one Flora Pineo for unpaid taxes on certain real estate, the defendant contested the suit on the ground that the real estate taxed was not in the town of Eden. It was held that the defendant was not estopped from making this contention notwithstanding that it appeared that for at least seventy-five years the defendant and her predecessors in title had paid taxes on the real estate to the plaintiff town believing that it was within the limits of such town. The court said: "Neither a town nor a county can acquire jurisdiction over a territory for taxing purposes by prescription. . . . They are the creatures of the legislature, and their boundaries and jurisdiction are just what the legislature has fixed, no greater, no less; and all inconveniences and absurdities caused thereby must be borne until the legislature shall correct them."

ADMISSIBILITY OF EVIDENCE OF CHARACTERISTICS OF MULE. — In Wilson *v.* State, (Ala.) 54 So. Rep. 572, which was a prosecution for murder, the State contended that the person killed, while driving several mules, was shot by the defendant who was at the time at or behind a certain black stump, and to sustain the claim it was allowed to show at the trial that one of the mules subsequently became frightened and shied when driven or ridden by the stump. It was held that no error was committed by the trial court in permitting this evidence to be introduced. The court said: "As a rule courts will take judicial notice of the nature and characteristics of domestic animals as being a subject of general and familiar knowledge. It is no doubt a matter of common knowledge that a mule will shy or take fright when passing a point where it had been previously and recently frightened at said point. The trial court did not, therefore, err in permitting the State to show that one of the mules driven by deceased when killed became frightened and shied when driven or ridden by the black stump in question. Nor was there any error in permitting the State to show by a witness, who had fifty years' experience with mules, that it was their nature and custom to take fright when passing a point where they were previously frightened. The force of this evidence would have been strengthened by proving that this mule did not previously take fright when passing this black stump, and the fact that this fact was not shown might weaken the probative force of this evidence, upon the theory that the mule may have been afraid of the stump, as it is a matter of common notice that horses and mules will often and repeatedly shy at certain things, although having previously passed them without hurt or harm; but the evidence was admissible, and the weight of same was a question for the jury."

MAINTENANCE OF PLANING MILL COAL YARD AND BINS IN RESIDENCE PORTION OF CITY A NUISANCE. — In Fifth Avenue, etc., Lumber Co. *v.* Johnston, (Ala.) 54 So. Rep. 598, a bill filed to abate a nuisance alleged in substance the maintenance of a planing mill and a coal yard and bins in the town of Woodlawn, now a part of Greater Birmingham, Ala., in a residence portion of said town or city, and so near to the residence of complainant as to render the habitation thereof undesirable, unpleasant, and burdensome by reason of the great noise, vibrations, and dust caused by and attending the operation of these plants. The location of the plants was alleged to be just across the street from, and in front of, plaintiff's residence. It was also alleged that by the creation and emission of this coal dust, and the unusual noises and vibrations in the operation of the plants so located, complainant's family, his wife and daughters, were disturbed and made nervous and sick and sore, and caused to lose the comfort and rest of their home, which they would have enjoyed but for the alleged nuisance. The bill further alleged that the value of plaintiff's home was thus being destroyed, to his great damage in the sum of $5,000, by the maintenance of this nuisance; that the plants were the only industrial ones erected or operated in the immediate vicinity of this residence portion of the town or city, and that they were so located after complainant had built his residence at a great cost, to wit, $4,000 or more. It was held on demurrer that the complaint stated a cause of action. The court said: "It is but right and proper that plants such as planing mills and coal yards and bins should not be located or carried on in the residence portion of a town or city, to the annoyance of the inhabitants thereof, though the business is a lawful and laudable one and is carried on in a proper manner. Of course, in determining whether or not a given plant, shop, or business is a nuisance by reason of its location, consideration must be given to its effect upon persons of ordinary sensibilities. It is not sufficient that it be considered a nuisance by those persons of very delicate and fastidious tastes or sensibilities; it must be of such character as to be a nuisance to those persons of average mental and physical condition, and those of normal sensibilities and tastes. . . . If the facts set forth in the bill are true — and on demurrer they must be so treated — the complainant is entitled to the relief prayed, and the court did not err in overruling the demurrer to the bill."

CONTINGENT FEE REDUCED. — In Ransom *v.* Ransom, 127 N. Y. Supp. 1027, the court refused to enforce an agreement entered into by attorney and client for a contingent fee of fifty per cent. and reduced the fee to seven and one-half per cent., it appearing that while the contract was not fraudulent in any

sense the stake was large and the probable work so small that at the very worst the attorney's natural *per diem* compensation would be recovered. The court discussing the validity of contingent fees said: "There is nothing inequitable about a contingent fee computed upon a percentage basis, although it be altogether disproportionate to what would be reasonable compensation for the lawyer's services if paid for in cash when rendered. Not only is there long delay in recovery, but services covering years may never be compensated at all. I think that the contingent fee should often be approved not only in the case of the penniless litigant, but also in the case of the litigant in the position of Mrs. Barker, possessed of but moderate means. One so situated should be able to arrange with some attorney in such a way that if unsuccessful her own funds should remain altogether intact or be diminished only by a moderate retainer; while in return for the risk that his services may thus be thrown away or only in small part compensated he has a chance of receiving an amount much greater than their cash value. In fact, when a lawyer sues his client upon a *quantum meruit*, the law as laid down by our courts makes the fee largely contingent upon success. . . . In my opinion the abuses commonly attributed to contingent fees are mainly attributable to one class only of the business so compensated, namely, that obtained by so-called ambulance chasing and other methods of touting for clients. Clients, whether touted for or not, are sometimes grossly overcharged, whether by way of contingent fees or other agreed fees, or fees exacted as representing a *quantum meruit*. In all these cases a court of equity should see that equity is done when the matter comes within its jurisdiction. The American Bar Association in 1908, after full debate upon the report of its very able committee on the Code of Professional Ethics, adopted as a canon of its code that 'contingent fees, when sanctioned by law, should be under the supervision of the court in order that clients may be protected from unjust charges.' The same canon was adopted by the New York State Bar Association in 1909. It is addressed rather to the judges and the legislators than to the bar, and legislation may perhaps be necessary to carry it fully into effect; but I do not know of any statute or controlling decision which limits the supervising power of the court when the matter comes into equity."

Interstate Carrier Not Allowed to Issue Annual Pass to Satisfy Claim for Damages. — In Louisville & Nashville R. Co. *v.* Mottley, 31 Sup. Ct. Reporter, it was held under the Act of Congress of June 29, 1906, section 6, prohibiting any interstate carrier unless otherwise provided from demanding, collecting, or receiving a greater or less or different compensation for the transportation of persons or property, or for any service in connection therewith, than the rates, fares, and charges specified in the tariff filed and in effect at the time, that an interstate carrier could not make a valid agreement with a person injured in an accident on the road, to issue an annual pass to him for life in consideration of a release of a claim for damages, and that a specific performance of the agreement would be refused. The court, *per* Mr. Justice Harlan, said: "The Act of Feb. 4, 1887, regulating commerce, declared it to be an unjust and unlawful discrimination for any carrier subject to the provisions of that act, directly or indirectly, by any special rate, rebate, drawback, or other device, to charge, demand, collect, or receive from any person or persons 'a greater or less compensation' for any service rendered or to be rendered in the transportation of passengers or property than was charged, demanded, collected, or received from any other person or persons for doing him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. 24 Stat. at L. 379, chap. 104, § 2, U. S. Comp. Stat. 1901, p. 3154. But the Act of June 29, 1906, made a material addition to the words of the Act of 1887; for it expressly prohibited any carrier, unless otherwise provided, to demand, collect, or receive 'a greater or less or different compensation' for the transportation of persons or property, or for any service in connection therewith, than the rates, fares, and charges specified in the tariff filed and in effect at the time. We cannot suppose that this change was without a distinct purpose on the part of Congress. The words 'or different,' looking at the context, cannot be regarded as superfluous or meaningless. We must have regard to all the words used by Congress, and, as far as possible, give effect to them. . . . In our opinion, after the passage of the Commerce Act, the railroad company could not lawfully accept . . . any compensation 'different' in kind from that mentioned in its published schedule of rates. And it cannot be doubted that the rates or charges specified in such schedule were payable only in money. . . . The evident purpose of Congress was to establish uniform rates for transportation, to give all the same opportunity to know what the rates were, as well as to have the equal benefit of them. To that end the carrier was required to print, post, and file its schedules and to keep them open to public inspection. No change could be made in the rates embraced by the schedules except upon notice to the commission and to the public. But an examination of the schedules would be of no avail and would not ordinarily be of any practical value if the published rates could be disregarded in special or particular cases by the acceptance of property of various kinds, and of such value as the parties immediately concerned chose to put upon it, in place of money for the services performed by the carrier."

Liability of Innkeeper for Defective Gas Fixtures Causing Asphyxiation of Guest. — In Patrick *v.* Springs, (N. C.) 70 S. E. Rep. 395, the record disclosed that the action was brought by the plaintiff to recover damages suffered by reason of being asphyxiated while plaintiff was a guest in defendant's hotel in Washington, N. C. The testimony shows that plaintiff and companion were assigned by defendant's clerk to a room in defendant's hotel. The evidence of plaintiff tends to prove that he was visiting Washington and stopped at defendant's hotel with his companion, one Mann. They were assigned to a room, and went to bed about eleven o'clock at night. The hotel was lighted by gas, and the plaintiff's room had a gas burner with no stop or safety pin in it, so that the key was loose and could be turned all the way around. One of the defendant's witnesses testified that he examined the fixture next morning, having been called in to repair it. He said the safety pin was out, and that with the pin out it would not be safe. Plaintiff testified that he turned out the gas carefully and discovered that there was no stop pin, and that he turned the key at the place where it should stop, and that he could smell no gas. Then he went to bed. During the night he woke up and found Mann crawling over him. The room was full of gas. He said he was asphyxiated, but managed to reach the door, and called for help. Plaintiff testified that he had not recovered from the effects. On this testimony there was a judgment for the plaintiff, his damages being assessed at $250, and on appeal the judgment was affirmed. The court said: "There has been considerable discussion by judges and text writers as to the liability of an innkeeper for personal injuries sustained by a guest. Cases are to be found where the innkeeper has been held liable for assaults by servants, and cases *contra*. But it seems now to be well settled that in case of an injury occurring in consequence of the unsanitary and defective condition of the inn premises or room to which a guest is assigned, the innkeeper is liable upon the same principles applicable in other cases where per-

sons come on the premises at the invitation of the owner or occupant and are injured in consequence of their dangerous condition. The innkeeper is not an insurer of his guests' personal safety, but his liability does extend to injuries received by the guests from being placed in an unsafe room. This is a matter peculiarly within the innkeeper's knowledge and entirely beyond the control of the guest. In that particular he is peculiarly within the innkeeper's power and protection. . . . When the plaintiff proved the unsafe and defective condition of the gas fixture, in consequence of which gas escaped during the night and injured him, he made out a *prima facie* case of negligence, which it was defendant's duty to answer. . . . It is undoubtedly true that if the defect is an obvious one, the guest must use reasonable care on his part, and if he is himself negligent and could have avoided the injury by due care, he cannot recover. . . . There are circumstances when the court can declare, as matter of law, whether a person has exercised reasonable care, but there are conditions when the question can only be solved by adopting the rule of the prudent man and submitting the matter to the jury. We think, under the conditions surrounding plaintiff, it cannot be fairly held that he necessarily failed to exercise due care as a matter of law. He fixed the key, as he thought, safely, so as to cut off the gas. Smelling none, he retired and went to sleep. The gas may have escaped through the loose key during the night by reason of continued pressure; the key not being firm enough in place to hold it. We think the question one peculiarly for the jury under such circumstances, and that it was fairly presented by the court to them."

News of the Profession.

THE LOUISIANA STATE BAR ASSOCIATION will meet in Hattiesburg, La., on May 2.

NEW LOUISIANA JUDGE. — W. B. Sommerville has been elected a member of the Louisiana Supreme Court to succeed Justice Francis T. Nicholls.

NEBRASKA JUDICIAL APPOINTMENT. — Governor Aldrich, of Nebraska, has appointed W. R. Hobart, of Mitchell, to be judge of the newly created Seventeenth Judicial District.

NEW UNITED STATES SENATORS. — Judge James A. O'Gorman, of New York, and Judge William S. Kenyon, of Ohio, have been elected to the United States Senate to represent their respective States.

KENTUCKY JUDICIAL APPOINTMENT. — The governor of Kentucky has appointed Charles Kerr, of Lexington, judge of the Fayette Circuit Court to succeed the late Judge Watts Parker.

ANOTHER LAWYER IN THE CABINET. — President Taft has appointed Walter L. Fisher, one of the most prominent lawyers of Chicago, to succeed Richard A. Ballinger as Secretary of the Interior.

OKLAHOMA JUDICIAL APPOINTMENTS. — A. M. Ferguson, of Durant, has been appointed district judge for the Sixth Judicial District, and Frank Matthews, of Altus, has received a similar appointment in the Twenty-fifth District.

IOWA JUDICIAL APPOINTMENT. — F. D. Letts, of Davenport, has been appointed judge of the Seventh Judicial District. His appointment was to fill the office created by the recent statute giving an additional judge to that district.

OHIO STATE BAR ASSOCIATION. — At the annual meeting of the Ohio State Bar Association which will be held in July at Cedar Point, former United States Senator Joseph B. Foraker will deliver an address on "Constitution Making in Ohio."

MONTANA JUDICIAL APPOINTMENTS. — The governor of Montana has appointed R. Lee McCulloch, of Hamilton, as the successor of Senator Henry O. Myers on the district bench of Ravalli county, and Frank N. Utter, of Havre, to be the second judge in the Twelfth Judicial District.

NEW MARYLAND JUDGES. — Governor Crothers, of Maryland, has appointed Judge Henry Stockbridge to succeed the late Judge Samuel D. Schmucker as a member of the State Court of Appeals. Carroll T. Bond has been appointed to succeed Judge Stockbridge on the supreme bench of Baltimore.

WASHINGTON JUDICIAL APPOINTMENTS. — The following appointments to the bench in Washington have been announced: Sol Smith, of South Bend, to the new judgeship of Pacific and Wahkiakum counties; King Dykeman and W. R. Prigmore to be Superior Court judges for King county.

ALABAMA COURT OF APPEALS. — The following have been appointed judges of the Alabama Court of Appeals, recently created: Edward De Graffenreid, Hale county; Richard W. Walker, Madison county; John Pelham, Calvin county. Judge Walker has been elected by his two associates presiding judge of the court.

APPOINTMENTS TO MAINE SUPREME JUDICIAL COURT. — The appointment has been announced of George F. Haley, of Biddeford, to succeed the late Henry Clay Peabody as associate justice of the Maine Supreme Judicial Court. Justice William P. Whitehouse, of Augusta, has been appointed to succeed himself as a member of the same court.

FEDERAL APPOINTMENTS. — The President has appointed W. L. Day, of Cleveland, to be United States district judge for the Northern District of Ohio to succeed R. W. Tayler, deceased. Mr. Day is the son of Associate Justice Day of the United States Supreme Court. U. G. Denman, of Toledo, has been appointed United States district attorney at Cleveland to succeed Mr. Day.

NEW JERSEY JUDICIAL APPOINTMENTS. — The following appointments to the bench in New Jersey have been announced: William P. Martin, of Trenton, to be county judge of Essex county, succeeding Judge Jay Ten Eyck; Curtis T. Baker, of Wildwood, to be judge of the Court of Common Pleas of Cape May county; Peter F. Bailey, of Trenton, to be judge of the Court of Common Pleas of Middlesex county.

CHANGE IN TEXAS SUPREME COURT. — Associate Justice F. A. Williams of the Supreme Court of Texas resigned his office on April 1. Justice Williams served nearly twelve years as associate justice of the Supreme Court. For seven years prior thereto he served as associate justice of the Appellate Court at Galveston, and for eight years he was district judge for Houston, Anderson, and Hamilton counties. Joseph B. Dibrell, of Seguin, has been appointed as successor to Justice Williams.

CONVICTED OF NEOGAMY. — The names of the following members of the bar have recently been entered on the records as neogamists: Miss Ray Beall, St. Louis, Mo.; George C. Bliss, Chicago, Ill.; Clarence G. Campbell, Boston, Mass.; Meredith B. Colket, Philadelphia, Pa.; Judge O. H. Hughes, Hillsboro, Ohio; Anthony F. Ittner, St. Louis, Mo.; Lantaro Roca, Caneclas, Mexico; Lyman W. Rogers, Kansas City, Mo.; Morris D. Saxes, Hartford, Conn.; Tristam Tupper, New York city; James C. Whedon, Philadelphia, Pa.

MASSACHUSETTS JUDICIAL APPOINTMENTS. — Governor Foss has made the following judicial appointments: John J. Ryan, of Haverhill, to be justice of the Central District Court of North Essex, to succeed the late Judge Fuller; Gerald A. Healy, of Canton, to be associate justice of the District Court, succeeding

the late Bushrod Morse; John D. McLaughlin, assistant corporation counsel of Boston, to fill the vacancy on the Superior Court bench caused by the resignation of Congressman Robert O. Harris.

DEATH OF CANADIAN JUDGE. — Justice Desire Girouard, senior judge of the Supreme Court of Canada, and father of Sir Edouard Percy Cranwell Girouard, governor of Northern Nigeria, died at Ottawa on March 22. Desire Girouard was born in 1836, in the Province of Quebec. For seventeen years prior to 1895 he represented a Quebec constituency in the House of Commons, and twice during that time was offered cabinet portfolios. In 1895 he was appointed to the Supreme Court. He was the author of several works on legal questions.

NEW JUDGE FOR PANAMA CANAL ZONE. — Walter W. Warwick, of Cincinnati, has been appointed by President Taft judge of the Supreme Court of the Panama Canal Zone. Mr. Warwick was for a number of years recognized as one of the ablest young lawyers at the Hamilton county, Ohio, bar. He was graduated from the Cincinnati Law School, and was an active practitioner until seven years ago, when he was appointed assistant legal clerk in the Treasury Department at Washington. Later he was made chief legal clerk. Two years ago he was made auditor of the commissary department of the Panama Canal Commission.

NOTED WESTERN JUDGE DEAD. — Joseph R. Lewis, eighty-one years old, formerly territorial judge of Idaho, and later territorial judge and territorial chief justice of Washington, died at Los Angeles, Cal., on March 19. Judge Lewis for many years was one of the most conspicuous figures in the legal world of the Northwest. As territorial judge he rendered high service in Idaho and subsequently in Washington. In the latter State he served on the supreme bench from 1873 to 1880. The last five years of that period he was chief justice of the court.

MEMORIAL SERVICES FOR JUDGE JAGGARD. — Memorial services for the late Justice Edwin A. Jaggard of the Minnesota Supreme Court were held in Minneapolis on April 3. Among those who delivered addresses were the following: J. D. Shearer, president of the State Bar Association; C. W. Farnham, secretary of the association; W. H. Leightner, St. Paul; Howard K. Abbott, Duluth; Judge Hellam, of the Ramsay County district bench; Senator Julius Haycraft, of Medalia; Judge Willis, of the Ramsay county bar; Judge J. B. Paige, of the University Law School, and Justice Bunn of the supreme bench.

DEATH OF EX-UNITED STATES JUDGE IN MONTANA. — Hiram Knowles, of Missoula, Mont., ex-United States district judge for Montana, died suddenly on April 6. He began his career in Nevada in 1862, becoming prosecuting attorney for Humboldt county the following year. In 1864 he was made probate judge. In 1865 he moved to Idaho, and in 1866 to Montana, where he finally settled. From 1868 to 1879 he served as associate justice of the Supreme Court of Montana. He was a member of the Montana Constitutional Convention in 1889. From 1890 to 1904 he was United States district judge for Montana.

JUDGE POPE, OF SOUTH CAROLINA, DEAD. — Former Justice Young John Pope of the State Supreme Court, died at Newberry, S. C., on March 29, aged seventy years. Judge Pope was born at Newberry. He was educated there and at Furman University, Greenville. He fought throughout the Civil War, and at its close was assistant adjutant of Kershaw's brigade. At the close of the war he became district judge. For one year he was a member of the House of Representatives. In 1890 Judge Pope became attorney-general, and the following year he was elected associate justice of the Supreme Court, which position he held until his elevation to the chief justiceship. About two years ago Judge Pope resigned because of his advanced age.

DEATH OF JUDGE PEABODY, OF MAINE. — Associate Justice Henry Clay Peabody, of the Supreme Judicial Court of Maine, died suddenly in his chambers in the Supreme Court room at the court house in Portland on March 29. Judge Peabody was born at Gilead in 1838. He prepared for college at Fryeburg Academy, and graduated from Dartmouth in 1859. He read law with General Samuel Fessenden, and was admitted to practice in 1862. In 1879 he was elected judge of probate for Cumberland county, and held that office until 1900, when he was elevated to the Supreme Court bench as successor to Judge Haskell. His judicial career covered a period of nearly a third of a century. His death has been deeply felt as a severe loss to the profession and to the bench.

English Notes.

LIBEL AND THE LAW. —

"Our statesmen all boast that in matters of treason
The law of Old England is founded on reason;
But they own that, when libel comes under its paw,
It is rarely indeed that there's reason in law."

(Quoted from a lecture recently delivered by E. G. Hemmerde, K. C., on "Libel and Slander under the Criminal Law.")

DEATH OF SERJEANT JELLETT. — Mr. Hewitt Poole Jellett, K. C., one of the oldest members of the Irish bar and his Majesty's second serjeant-at-law in Ireland, died on March 18, in Dublin, aged eighty-six. Serjeant Jellett was educated at Trinity College, where he took his degree in 1846. In the following year he was called to the bar, and after a successful career as a junior he took silk in 1864 and was elected a Bencher of the King's Inns in 1875. For many years he was second serjeant-at-law in Ireland, and he acted as chairman for Quarter Sessions for King's county, a position from which he retired at the passing of the County Court Act, 1877. He did not retire, however, from practice at the bar until 1900. Serpeant Jellett had appeared in many of the leading cases of the latter half of the nineteenth century, and was the last survivor of the counsel employed in the Yelverton trial. His contemporaries in those days of the Irish bar included Serjeant Armstrong and Isaac Butt.

THE YELLOW PRESS. — It is quite time that some serious attention was devoted by the legislature to the subject of newspaper libels, says the *Law Times*. It is common knowledge that the practice of certain journalists to defame individuals from motives mainly, if not entirely, of self-advertisement is increasing. Now that so many organs of the press are controlled by men, or groups of men, possessing large financial resources — and the business of the press is in itself not otherwise than lucrative — the position of some ordinary individual singled out for attack is far from pleasant. The expense of vindicating character is exceedingly heavy, and though juries have of late awarded some sensational sums as damages, it may still be from a purely financial point of view more expensive to prove innocence than to accept the abominable treatment meted out by the Yellow Press. The best method of

reconciling a reasonable power to criticise with some power to deal drastically with those who overstep the mark is a matter upon which it is not easy to dogmatize with confidence. It is perfectly plain that damages in themselves are not sufficiently deterrent. It is, indeed, clear that the profits derived by certain periodicals which devote themselves regularly to "open letters" and the like are so largely increased by these means as to be well capable of standing a few libel actions every year. Proceedings of a criminal nature, involving personal disabilities in addition to exceedingly heavy fines, may turn out to be the only means of preventing healthy criticism degenerating into unbridled attack.

ADOPTION OF GREENWICH TIME BY FRANCE. — Both the advocates and critics of the project for legislation in regard to daylight saving will be watching for the lessons deducible from the change made in French time as a consequence of the adoption of Greenwich time. The delay in bringing about a change decided on some time ago was none too great when allowance is made for the complications consequent upon a loss of less than nine and a half minutes. All undertakings, such as railways and so on, which work according to a time schedule will have had to consider how this change was going to affect them, and there may be some considerable points arising as to the exact hour when births or deaths have taken place or losses arising out of fires or accidents. Some of the most curious results might be found in regard to trains actually in motion on busy lines such as the P. L. M. Whilst a train due to start at midnight can conveniently wait until 12.9½ A. M., what will happen to one actually in motion? Presumably it will be permitted to run behind its apparent time on the section passed through at that critical period of the night, and any confusion thus caused must be accepted rather than to compel an express to run to time and to stop for such a period as will enable it to arrive correctly at its destination. In this case, however, France is falling into line with international practice and advantages will be gained in the arrangement of international traffic, and in this respect the problem of changing English time presents difficulties of a more serious character.

SUIT OF ARMOR CASE. — An interesting law case in connection with a suit of armor, three centuries old, made of wonderful steel work inlaid with gold, which lay rusting for many years in an attic at Holme Lacy, has been occupying the attention of the Chancery Division. The armor, which has been valued at sums varying from £2,000 to £20,000, was to have been sold with the other treasures at the Earl of Chesterfield's historic home in February, 1910, but on the second day of the sale it was disposed of privately to a Mr. George Harding, an art dealer. The price paid was £2,000. The action was brought by Lord Chesterfield, who asked for a declaration that the sale was procured by fraudulent misrepresentation, and asked that the sale should be set aside. Lord Chesterfield stated that Mr. Harding's son, who carried the business through, said that he was acting not for himself, but for a particular client. The armor was to have been sold by auction, but young Harding, it was alleged, stated that if his client was to buy it at all the armor must be sold to him privately, and that if it was not sold to him privately he would not bid at the auction. The reason alleged for this was that the client was a collector who was anxious that the price he gave for things in his collection should not be known to the public. It was stated for the plaintiff that the representation about a client was made with the object of obtaining the withdrawal of the goods from the competition of the sale by auction. Lord Chesterfield thinking that he would get a better price than if he sold the suit by auction accepted £2,000 for it. The defense denied the allegation. The judge ordered the delivery of the armor to Lord Chesterfield as against the return of the sum of £2,000, with interest at five per cent.

TRADE LIBELS. — The case of Griffiths *v.* Benn, in which the Court of Appeal gave judgment last month, again raised questions as to what are popularly called, though inaccurately, trade libels. Where goods of a trader or manufacturer are disparaged by another, it would seem that three positions may arise. In the first place, if one man merely puffs his own goods and says they are better than those of A B, A B will have no cause of action. If, however, untrue statements of fact are unjustifiably made about the goods of A B, an action on the case will lie provided special damage can be proved. But on the other hand, if the words used, though directly disparaging goods, may also impute carelessness, misconduct, or want of skill in the conduct of his business by the trader, so as to defame the trader personally, then the ordinary action for defamation will lie. The point was tersely summed up by Lord Halsbury in Linotype Company Limited v. British Empire Typesetting Machine Company Limited, 81 L. T. Rep. 331, where he said: "While mere criticism upon a manufacture or goods is lawful, an imputation upon a man in the way of his trade is, even without special damage, properly the subject of an action." The same case also lays down that whether in any particular case the words complained of are susceptible of a defamatory meaning, or are simply a disparagement of goods, is for the jury; but, of course, it is for the court to hold whether or not they are reasonably susceptible of such a meaning, and if they are not, then the case would be withdrawn from the jury. In the present case before the Court of Appeal, that tribunal was of opinion that the attack was on the system alone, and not upon the plaintiffs; and that, coming as it did under the second of the two positions referred to above, as no special damage had been proved the defendant was entitled to judgment.

GENTLEMEN OF THE LONG ROBE. — The well-known expression "gentlemen of the long robe," in use in formal documents of the House of Commons, is understood to comprise all members who at the time would be qualified to practice as counsel according to the rules and usage of the profession, whether actually practicing or not. It derives its origin from the time when members of the House of Commons appeared in that assembly in levee costume, and was perpetuated by the custom at a later period of members of the House of Commons who were also members of the bar of crossing Westminster Hall from the law courts to the House of Commons to take part in divisions without divesting themselves of the bar costume. Mr. Haldane on one occasion revived the old custom of appearing in the House of Commons in bar costume when he hurried from the bar of the House of Lords, at which he was appearing as counsel in an appeal case, for a division in the House of Commons, and, laying aside his full-bottomed wig, went into the chamber of the House and the division lobby in his robes. In August, 1892, Mr. (Justice) Dunbar Barton seconded the address to the throne in the House of Commons attired, as is stated in Hansard, in the robes of an Irish Queen's Counsel. The robes of the speaker of the House of Commons are identical with the robes of the Master of the Rolls — a circumstance due to the fact that the mastership of the rolls and the speakership of the House of Commons were frequently held in conjunction in former days by the same individual. The holder of the office of Master of the Rolls was not excluded from the House of Commons till the passing of the Judicature Act. A bill rendering the occupant of that office ineligible for the House of Commons passed first and second reading and the committee stage in 1853, but the motion for its third reading was defeated on the 1st June, 1853, by Mr. (Lord) Macaulay —

a solitary instance in recent times of votes in that assembly having been influenced by the effect of a speech.

MEANING OF TERM "DEPENDENT." — Despite all judicial decisions on the subject, it would, we conceive, be found extremely difficult to convince the ordinary plain man of business that a right reading has been given to the definition of "dependents" which is contained in section 13 of the Workmen's Compensation Act 1906 (Edw. VII., c. 58). The hypothetical "man in the street," happening to be an employer of labor, would probably never be made to comprehend this result of such decisions. Although one of the workmen employed by him, who has been killed by an accident arising out of and in the course of his employment, has failed during his lifetime to perform the duty of supporting his wife, yet she was "wholly or in part dependent upon the earnings of the workman at the time of his death, or would, but for the incapacity due to the accident, have been so dependent." The employer, therefore, is compellable in a sense to fulfil the obligation which the workman has neglected to discharge. Nevertheless, that is what is seemingly the outcome of the decisions of the English and Scotch courts, as appears from what was said by the learned judges of the Court of Appeal in the recent case of Keeling *v.* New Monckton Collieries Limited, 103 L. T. Rep. 622. The effect of the presumption in law that a husband is liable to maintain his wife was fully dealt with by the Court of Appeal in the case of Coulthard *v.* Consett Iron Company Limited, 93 L. T. Rep. 756, (1905) 2 K. B. 869. It arises from her right to support which is inherent in her position as a wife. It is a presumption that, like others, is, of course, liable to be rebutted. As was pointed out, however, by the Master of the Rolls (Cozens-Hardy) in the case of Williams *v.* Ocean Coal Company Limited, 97 L. T. Rep. 150, (1907) 2 K. B. 402, it is not rebutted by the mere fact of desertion; nor by proof that the husband was not *de facto* contributing to her support at the time of his death, but that she was supported by some one else, or was earning her living by her own labors. What, at the same time, appears somewhat startling is that such a presumption should be permitted to prevail, so far as a wife's right to compensation under the Act of 1906 is concerned, after the remarks of the learned Lords in the case of Hodgson *v.* Owners of West Stanley Colliery, 102 L. T. Rep. 194, (1910) A. C. 229. The Lord Chancellor (Loreburn) there said that it was for the "County Court judge to ascertain, purely as a question of fact, who are dependent," and that there was "no room for legal presumptions;" while Lord Macnaghten observed that the question of dependency was not a question of law at all, but was purely a question of fact, a conclusion that was expressly concurred in by Lord Shaw. After that explicit ruling, it was naturally contended in Keeling's case (*ubi sup.*) that dependency has now, in each case, to be treated as a question of fact; and that, as the wife in that case had not cohabited with her husband for upwards of twenty years, and had supported herself during the whole of that period by her own exertions, she was not "dependent upon the earnings of the workman at the time of his death." Because, however, the House of Lords did not go *seriatim* through the earlier decisions of the Court of Appeal and definitely dissent from them, the learned judges before whom Keeling's case was argued unanimously decided that those decisions could not be regarded as overruled. The learned County Court judge who acted as arbitrator in Keeling's case had, it is true, found that there had been no abandonment of her legal right to support by the wife, and consequently had awarded her compensation. This finding would apparently go some way in the direction of satisfying the requirements specified by Lord Loreburn, L. C. But it scarcely seems to fit in with the words of the definition of "dependents" in section 13 of the Act. And an amendment of it, either in favor of the view expressed in Keeling's case or negativing the same, would not be out of place. It is interesting to note that the same learned County Court judge who decided that case has had lately before him another very similar one — Graham *v.* Walton (130 L. T. 367), in which his finding of fact was directly opposite to that in Keeling's case, for reasons which he was careful to assign.

THE RIGHT OF PEERS TO VOTE. — The Earl of Roden, whose alleged breach of the privileges of the House of Commons in voting at an election of a member of that assembly (his name appearing in the register of voters) is a matter which has been referred to the Committee of Privileges, which met for the first time on March 21, under the presidency of Mr. Asquith, comes of a legal stock. Robert Jocelyn, the founder of his family, studied law in the office of a solicitor named Salkeld, in Brooke Street, Holborn, where he made the acquaintance, as a fellow student, of Philip Yorke (Lord Chancellor Hardwicke). Jocelyn was called to the Irish bar in 1706, and, through the influence of his lifelong friend Yorke, who was then Lord High Chancellor of Great Britain, was appointed to the lord chancellorship of Ireland in 1739, and created Viscount Jocelyn in the peerage of Ireland in 1755. His only son, Robert Jocelyn, was advanced a step in the peerage, and became the first Earl of Roden. The House of Commons, at the commencement of each session, agrees to the following resolution: "That no peer of this realm except such peers of Ireland as shall for the time being be actually elected, and shall not have declined to serve for any county, city, or borough of Great Britain, hath any right to give his vote in the election of any member to serve in Parliament." In a debate in the House of Lords on the 27th June, 1853, it was laid down that peers were restrained from voting by immemorial usage irrespective of this resolution. Lord Brougham on that occasion "hoped his learned friend (Lord Campbell) would not believe that he entertained the motion that a peer had the right to vote in the election of a member of the House of Commons. He never dreamt of such a thing." Again, on the 5th July, 1858, Lord Campbell said: "A peer has no right to vote by the common law of England for the election of members of the House of Commons." The resolution of the Commons only declares the common law. On Nov. 15, 1872, the legal question of the rights of peers to vote or to be entered upon the register of voters was conclusively decided by the Court of Common Pleas. The Earl of Beauchamp and the Marquis of Salisbury, having had their names struck off the register by the revising barrister, appealed to the Court of Common Pleas. The counsel for the noble appellants scarcely ventured to maintain their own case, and the court unanimously decided that by the law as derived from authorities and from the determination of election committees as well as by resolutions of the House of Commons, peers had no right to vote, and the appeal was accordingly dismissed with costs. (*Times* report, Nov. 16, 1872.) So recently as Feb. 19, 1906, a resolution was proposed: "That Lord Atkinson, a peer of Parliament, has by his action in voting at the election in the St. Stephen's Green Division of Dublin been guilty of a breach of privilege." The resolution was withdrawn after the reading of a letter from Lord Atkinson, addressed to the Speaker, in which he stated: "At the time I voted I did not think that any question could be raised as to my right to exercise the franchise, since my patent had not been delivered to me, nor had I received any summons to the House of Lords. Since my attention has been called to the matter, I think I may have offended against the spirit of the resolution of the House of Commons, if not the letter. I therefore regret having voted, and beg through you to apologize to the House if I have, unwittingly, in any way in-

vaded its privileges." The vote of an Irish peer not being elected for any place in Great Britain was admitted to be bad, though the name was on the register (Droitwitch, 1835, K. & O. 65; Lord Southwell's case), and the names of such peers may be struck out at the Revision Court (Rendlesham (Lord) *v.* Howard, L. Rep. 9 C. P. 252).

CENSURING SPEAKER OF HOUSE OF COMMONS. — The suspension from the service of the House of Commons of Mr. Ginnell for a breach of privilege in sending to the press for publication a letter addressed to him by Mr. Wedgwood, M. P., accusing the Speaker of partiality in his conduct in the chair, is a sentence lighter than the sentence passed in not very remote times for similar offenses. In July, 1882, Mr. O'Donnell, for insulting the chairman of committees in saying that the action taken by him was an infamy, was suspended for fourteen days from the service of the House. So, too, on the 20th July, 1888, Mr. Conybeare, for the publication of a letter in the press accusing Mr. Speaker Peel of partiality in the chair, was suspended from the service of the House for the remainder of the session, or for one calendar month, whichever should first terminate. Speaking on the 20th July, 1888, Mr. Gladstone thus enunciated the course to be taken in reference to criticism of the Speaker in his official capacity, and deprecated attacks on the chair in newspapers: "I take it to be quite indisputable that when an honorable member is of opinion that the Speaker has erred in judgment in any part of his duty, it is in the power of the member, subject to the very grave considerations of high parliamentary prudence and expediency, if he thinks the magnitude of the subject demands it, to call in question the conduct of the Speaker in a regular and formal manner. This I believe to be the absolutely established principle. The Speaker in the chair wields enormous powers, but the whole of these powers are provisional, inasmuch as there is not one of them that cannot either in a general or particular sense be brought under the review and judgment of this House. . . . I admit there is a parliamentary and legitimate method, although a grave one — but I hope the time may never come when it may be necessary to resort to it — by which the conduct of the Speaker may be called in question. We have every opportunity of appealing to the Speaker, and then, should the necessity arise, the power of appealing from him. I cannot and do not deny that expressions of this kind used with regard to the Speaker in a public journal or in any other way are distinctly breaches of the privileges of this House, aimed at the dignity and security of its proceedings, and I cannot deny — on the contrary, I am bound to admit and even assert — that these methods of proceeding with a view to censure the chair are wholly incompatible with the law and practice of Parliament." The legitimate method, which Mr. Gladstone hoped the necessity of invoking might never arise, for calling into question the conduct of the Speaker is by due notice of motion, prescribed by the rules, that on some future day a vote of censure on the Speaker will be moved. It need hardly be said that such an event is abnormal and happens but rarely, and would only be acceded to by the House if the circumstances fully justified it. In 1695 Sir John Trevor, Speaker of the House of Commons, was in a report of a select committee of the House of Commons stated to have received in the previous session from the city a thousand guineas for expediting a local bill. A resolution was moved, which he had himself to put from the chair, that he had been guilty of a high crime and misdemeanor. On the following day, if he had returned to the House, he would have had to put the question on a motion for his own expulsion. He pleaded illness, resigned the speakership, and was instantly expelled. Sir Fletcher Norton (afterwards Lord Grantley), who had filled the office of attorney-general, was elected to the chair in 1770. Soon after his election he was exposed to a motion of censure by Mr. Dowdeswell, ex-Chancellor of the Exchequer, on the ground "that the words spoken by Mr. Speaker from the chair [in reference to Sir William Meredith] are disorderly, imputing an improper reflection on a member of this House, and dangerous to the freedom of this House." A long debate ensued, but the Speaker was supported by ministers, and the motion was negatived without a division. The latest case of the proposal of a vote of censure on a Speaker occurred on the 7th May, 1902, upon the motion of Mr. Mooney. Mr. Dillon had been censured by the Speaker on the 20th March, 1902, and suspended by reason of an offensive observation directed to Mr. Chamberlain, who was then Colonial Secretary, Mr. Dillon having been previously much excited by a remark of Mr. Chamberlain. As the Speaker declined to accede to the request of Mr. Dillon that he should rule Mr. Chamberlain out of order and demand the withdrawal of the words, a motion was made from the Irish benches for a vote of censure on the Speaker, which was defeated — ayes, 63; noes, 398.

Obiter Dicta.

WHAT HAPPENED TO THE DOG? — Boots *v.* Canine, 94 Ind. 408.

NOT IN THE UNITED STATES. — Can a corporation be a "respectable person"? See Willmott *v.* London Road Car Co., [1910] 2 Ch. 525.

ANOTHER EXCUSE FOR DISSENTING OPINIONS. — "The right to have the last word is not a privilege to the fair sex alone." *Per* Deemer, J., dissenting, in Funck *v.* Farmers Elevator Co., 142 Iowa 621.

DARN 'EM. — "No one surely could be misled into the belief that holes will not appear in complainant's socks if they are worn long enough." *Per* Lacombe, J., in Holeproof Hosiery Co. *v.* Wallach Bros., 172 Fed. Rep. 859.

THE ART OF ADVERTISING. — The following "ad." appeared in a recent issue of a New York daily:

> AVIATION.
> Practical instructions given in how to fly aeroplane in exchange for automobile. Oppor., C 251 Times Downtown.

A SYSTEMATIC DRINKER. — "There was evidence strongly tending to show that deceased was under the influence of intoxicating liquors to such an extent as to enable a witness to pronounce him 'considerably organized.'" *Per* Neill, J., in Texarkana, etc., R. Co. *v.* Frugia, (Tex. Civ. App.) 95 S. W. Rep. 563.

SELF-CONVICTED OF PROFANITY. — In Stillwell *v.* McPherson, 172 Fed. Rep. 151, Ray, J., says: "The writer has been familiar with sheet iron stovepipe, plain and corrugated, for at least fifty years, and from youth until the present day has had occasion to assist or act as principal, in emergencies, in putting up the stovepipe, now only used in the writer's kitchen."

THE LAW REPORT AS AN ADVERTISING MEDIUM. — The Dubuque Star Brewing Company, of Dubuque, Ia., will probably go down in history as the only brewery advertising in the official law reports. In volume 142 of the Iowa reports, at page 656, will be found a quarter-page ad. of the aforesaid brewing company, consisting of a photograph of the brewery premises. The name of the company is easily readable on the side of one of the buildings in the picture.

WILL IT HAVE A COLUMN ON "BEAUTY HINTS"? — According to the daily press, women lawyers in New York city are about

to bring out a new publication, which is to be known as the *Women Lawyers' Journal*, and will make its initial appearance on May 1. The interests of women lawyers will be furthered through this medium and also the interests of women in general will be advanced through the new publication if the hopes entertained by the editors materialize.

THE SUPREME COURT VISITS BERMUDA. — Judge Nickerson of the Supreme Court of West Cornwall, Conn., has arrived with a large party at The Kenwood. The judge declares that there is no place like Bermuda, and that he will visit it again in the near future. — *The Royal Gazette* (Hamilton, Bermuda), April 4th.

"Nick," as his many friends call him, is a learned justice of the peace, and withal a very wide-awake lawyer.

HOW DID THE COURT KNOW SO MUCH? — A dispatch from Columbus, Ind., to an Indianapolis newspaper says: "Lew Thompson was acquitted of a gaming charge in Mayor Barnaby's court this morning. The evidence showed that the accused was playing 'freeze out,' and as the police stopped the game before it was finished the court held that nothing was won or lost. Prosecuting Attorney Ralph Spaugh played solitaire with a deck of cards that had been introduced as evidence while the attorney for the defense made his argument to the court."

A MATTER OF JUDICIAL KNOWLEDGE. — Judges may not be able to own automobiles, but Judge Powell of the Georgia Court of Appeals has certainly more than a bowing acquaintance with them. He must have done a good deal of joy riding with his friends in order to be able to write in this manner: "It is insisted, in the argument, that automobiles are to be classed with ferocious animals, and that the law relating to the duty of the owners of such animals is to be applied. It is not the ferocity of automobiles that is to be feared, but the ferocity of those who drive them. Until human agency intervenes, they are usually harmless. While, by reason of the rate of pay allotted to judges in this State, few, if any, of them have ever owned one of these machines, yet some of them have occasionally ridden in them, thereby acquiring some knowledge of them; and we have, therefore, found out that there are times when these machines not only lack ferocity, but assume such an indisposition to go that it taxes the limits of human ingenuity to make them move at all. They are not to be classed with bad dogs, vicious bulls, evil-disposed mules, and the like." See Lewis *v.* Amorous, 3 Ga. App. 50.

STUNG! — When Judge Coffey, judge of the Probate Department of the Superior Court, of San Francisco, entered his court room one morning, the customary knocking of the gavel by the bailiff silenced the assemblage. When he called the calendar, and reached the case of "Estate of ———," the attorneys for both the executor and the heirs answered "ready." When the case was actually called, the attorney for the executor petitioned the court for forty dollars as compensation for services rendered in the sale of certain real estate, the assets of which were to go to the heirs proper. The attorney for the heirs objected to any such allowance. The two men took up almost an hour of the judge's time in discussing the reasonableness of the fee demanded. Finally the attorney for the heirs, in concluding a long, rabid oratorical effort, said, "If your honor please, to grant such a thing would be the height of injustice, and in common parlance of my mother tongue I call it 'gall' to —" Judge Coffey interrupted the effort by saying, "All 'Gaul' is divided into three parts, two of which are before the court." To which the attorney for the heirs replied, "From the tone of your Honor's remark, one may infer where the third part is."

READS LIKE A COLLEGE YELL. — The following style of letterhead we recommend to young lawyers fresh from college:

OFFICE OF

HOLLAND, THE LAWYER — HOLLAND, THE REAL ESTATE MAN

Hon. W. W. Holland, Jr., L.L.B., U. of T. '03.

Practice in all Courts. No trouble to answer legal questions regarding Texas Laws. — Not a collecting agency except under special contract. Licensed conveyancer of Real Estate.

MOTTO:—"ACTION, NOT AIR." — P. O. Box, C.

HOUSTON, TEXAS.

PHONETICALLY SPEAKING. —

It happened thus. Attorney Hall,
In re Estate of Nancy Snider,
Dictated this way: "In the fall
She put her apple crop in cider."

Which when his secretary heard,
Although her eyes grew somewhat wider,
She wrote it down without a word:
"She put her apple crop inside her."

Roy Temple House, in the *Green Bag*.

A good instance of phonetic blunder. A somewhat similar error occurred, we have been informed, in reporting a debate in the United States Senate, shortly before the Civil War. A senator spoke of the time when the government was "in the hands of the Free Soilers," and the *Congressional Record* printed it "in the hands of three sailors." By the way, in the Munson and Pitman shorthand systems, and perhaps in others, the outline for "liar" is identical with that for "lawyer."

AN EXHIBIT IN COURT. — An Indian judge, when first appointed to his position, was not well acquainted with Hindustani, says the Bombay *Gazette*. He was trying a case in which a Hindu was charged with stealing a "nilghai." The judge did not like to betray his ignorance of what a nilghai was, so he said, "Produce the stolen property."

The court was held in an upper room, so the usher gasped. "Please, your lordship, it's downstairs."

"Then bring it up instantly!" sternly ordered the judge.

The official departed and a minute later a loud bumping was heard, mingled with loud and earnest exhortations. Nearer came the noise, the door was pushed open, and the panting official appeared, dragging in the blue bull.

The judge was dumfounded, but only for an instant.

"Ah! That will do," said he. "It is always best, when possible, for the judge personally to inspect the stolen property. Remove the stolen property, usher."

VIRGINIA OLD AND NEW. — The Virginia State Board of Law Examiners has adopted new rules with reference to the qualifications of applicants for admission to the bar. Hereafter, for one thing, would-be lawyers must be of good character. The *Times-Dispatch*, of Richmond, regards these changes in the rules as "startling." Alas! How poor old Virginia must have changed in recent years. Her glory is evidently but a faded flower. But what a flower that must have been! Listen to this testimony taken from the Missouri law reports (Riley *v.* Sherwood, 144 Mo. 354): "To one who never lived in the Old Dominion prior to the late war between the States, the fondness with which all Virginians dwell upon those halcyon days, sweetened with an unrivaled hospitality — this tendency to recall again and again the memories of that period — may seem unnatural; but to those who knew Virginia at that time, even as casual sojourners, instead of being evidence of weakness it would excite suspicion should a Virginian neglect for any considerable time to recount the glories and delights of that period. Indeed, it can be said that such was the spell of that life that all who came within its influence became intoxicated with its charms, and ever afterwards dwelt with loving reiteration upon its refinement." The writer of the foregoing, Judge

James B. Gantt, is not a native of Virginia. But he was a "casual sojourner" there, for he graduated from the University of Virginia in 1868. It must be that in those times in the old commonwealth it was not at all "startling" for such a representative class of citizens as lawyers to be of good character.

NOT A NATURE FAKIR STORY. — A most interesting recent case is that of Kopplin *v.* Quade, 130 N. W. Rep. 511, decided by the Supreme Court of Wisconsin. Perhaps we had better let Judge Barnes tell the facts himself: "On Sept. 14, 1907, the plaintiff was the owner of a thoroughbred Holstein-Friesian heifer, which was born on Jan. 8, 1906, and had been thereafter duly christened 'Martha Pietertje Pauline.' The name is neither euphonious nor musical, but there is not much in a name anyway. Notwithstanding any handicap she may have had in the way of a cognomen, Martha Pietertje Pauline was a genuine 'highbrow,' having a pedigree as long and at least as well authenticated as that of the ordinary scion of effete European nobility who breaks into this land of democracy and equality, and offers his title to the highest bidder at the matrimonial bargain counter. The defendant was the owner of a bull about one year old, lowly born and nameless as far as the record discloses. This plebeian was something of a 'social climber,' and having aspirations beyond his humble station in life, wandered beyond the confines of his own pastures, and sought the society of the adolescent and unsophisticated Martha, contrary to the provisions of section 1482, St. 1898, as amended by chapter 14, Laws of 1903. As a result of this somewhat morganatic mésalliance, a calf was born July 5, 1908. Plaintiff brought this action to recover resulting damages and secured a verdict for seventy-five dollars, upon which judgment was entered, and defendant appeals therefrom. . . . The plaintiff offered testimony tending to show that he kept and intended to keep Martha for breeding purposes and for the milk which she might produce, and not for sale. It also showed that plaintiff was the owner of a blue-blooded bull of the Holstein-Friesian variety, to which he intended to breed Martha some three months later than the date of the unfortunate occurrence related. There was evidence tending to show that a thoroughbred would be worth all the way from $22.50 to $150, depending on its sex, markings, and other characteristics. Its sinister birth disqualified the hybrid calf from becoming a candidate for pink ribbons at county fairs, and it was sold to a Chicago butcher for seven dollars, and was probably served up as pressed chicken to the epicures in some Chicago boarding house." The judgment was affirmed.

A JURIST ON THE BARROOM COUNTER. — Rollestone *v.* Cassirer, 3 Ga. App. 161, was an action for damages against a saloonkeeper by the widow of one of his customers whose death ensued from injuries caused by the falling upon him of a barroom counter, "constructed so that the outside of it hung over from its centre of gravity, . . . without being fastened to the floor or in any way to protect its falling over." We have heard (*sic*) that such a contrivance in such a place would be perpetrated only by a very stupid man. "We have heard," said Judge Powell, in the case above cited, "that one reason why bar-counters are made in the style they are said to be made is that customers in places where such counters are found frequently feel a desire to lean against, catch hold of, or pull up something, and the bar-counter is made so as to accommodate them in these particulars as well as in others." We have heard of a solid but corpulent man who had a habit of amusing himself by lifting and tilting the bar-counter with his *boss* to the extreme consternation of the bartender. Returning to Judge Powell: "A part of this sober man's knowledge which he was called upon to exercise," said the judge, "was a realization of the fact that he was drunk (this is not a bull, but a legal nicety), and that, being drunk, his physical and mental powers and faculties were impaired." Was the judge here speaking "by the card," in his estimate of the deceased man's "knowledge," or was it really another "we have heard," but from an unreliable source? To us, personally unacquainted

with him, his friend Judge Speer has certified him to be "the original and attractive Powell," in Henderson *v.* Phillips, 178 Fed. Rep. 374, 376. Against Judge Powell (or his informant), however, duty compels us to quote another expert observer (or *his* informant) who declared in his seat of judgment that men under the influence of liquor commonly "think they were not as drunk as they appeared to others, and in fact were." *Per* Judge O'Rear, in Louisville, etc., R. Co. *v.* Deason, (Ky. 1906) 96 S. W. Rep. 1115, 1116. But in the Georgia case an order sustaining a demurrer to plaintiff's petition was reversed, the judge's informant authorizing him to speak as follows: "We cannot say, as a matter of law, that it was not natural, prudent, and reasonably to be anticipated, that one who had casually stumbled, fallen, or otherwise come into contact with a bar-counter, should lean against, catch hold of it, or pull up by it." The judge's monitors (and transmitters of hearsay, perhaps) in the case were James L. Key, Esq., for plaintiff, and Messrs. Koutz & Austin, all of them leaders at the Atlanta bar.

Correspondence.

ANTE-MORTEM PROBATE OF WILLS.

To the Editor of LAW NOTES.

SIR: In April LAW NOTES an article appears referring to "Proposed Ante-mortem Probate of Wills," in which the proposed measure is referred to as "novel" and "progressive," and statement is made that the idea originated with Hon. Albert Pillsbury, of Boston. I desire to call your attention to the fact that this line of legislation is ancient history in Michigan. In 1883 the legislature passed an act known as Public Acts No. 25 of that year, which provided for probate and allowance of wills during the lifetime of the maker. In 1885 the Supreme Court held this statute inoperative and void. If you have sufficient curiosity to care to see the case in question it is reported in volume 56 Michigan Supreme Court Reports on page 236. You will hence see that there is nothing "novel" in the idea, and that this is another illustration of the adage that "there is nothing new under the sun," though the Michigan court said that ours was the first statute of its kind in the United States or England at that time. J. F. WILSON.

PORT HURON, MICH.

VERDICT BY LESS THAN TWELVE JURORS.

To the Editor of LAW NOTES.

SIR: It seems strange that your editorial staff should not be aware of the provision of the Constitution of Louisiana, adopted in 1898, permitting verdicts by a less number of jurors than twelve. Article 116 provides as follows:

"All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, which shall not be prior to 1904, be tried by the judge without a jury. Cases in which the punishment may be at hard labor shall be tried by a jury of five, all of whom must concur to render a verdict; cases in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom concurring may render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict."

Nine jurors can render a verdict in civil cases. It will be seen, by the above, that misdemeanors of every kind are now tried by the judge without a jury, since the legislature has never exercised its prerogative of returning to the old system of trying this class of cases with a jury.

I think I may say, also, that our system is well past the experimental stage, and that its workings have been most salutary. In this State, the trial of civil cases with a jury is the rare exception. Ninety-five per cent. or more of all civil cases are tried directly before the judge, from whose decision an appeal is allowed on both the law and the facts. These observations have been suggested by your article on page 2 of the current number of LAW NOTES. J. W. HAWTHORN.

ALEXANDRIA, LA.

Law Notes

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Proposed "Recall" Legislation.

RECALL of judges is the topic most violently panhandling for public attention nowadays. Governor Woodrow Wilson says: "To apply to them [the judges] the principle of the recall is to set up the idea that determinations of what the law is must respond to popular impulse and to popular judgment." As the guest of the Academy of Political Science in New York, May 13, President Taft referred to "a provision of law under which if his [a judge's] rulings and conduct in court do not suit a small percentage of the electors of his district he may be compelled to submit the question of his continuance on the bench during the term for which he was elected to an election for recall in which the reason for his recall is to be included in 200 words, and his defense thereto is to be equally brief. It can hardly be said, my friends," continued the President, "that this proposed change, if adopted, will give him greater authority or power for usefulness or constitute a reform in the enforcement of the criminal law of this country. It will certainly not diminish the power or irresponsibility of counsel for the defendant. Let us hope that the strong sense of humor of the American people which has so often saved them from the dangers of bathos and demagoguery will not be wanting in respect of this 'nostrum.'" Why not trust that the American citizen's sordid desire to earn his daily bread without frequent and noxious interruptions will turn out to be an impenetrable barrier? On the same occasion Congressman McCall, of Massachusetts, said: "Would Lincoln have escaped recall in 1862 after a long series of unsuccessful battles and with the great organs of public opinion ranged against him? What sort of a judge would you have if he were no sooner upon the bench than he might be compelled with his official life at stake to argue a legal decision upon appeal before a popular tribunal, perhaps before the very mob from whose vengeance he had just rescued a prisoner? Under such a system would a judge be likely to go to the fountains of jurisprudence, or would he consult the weathervane?"

Fear of Recall of Judges Probably Exaggerated.

APPREHENSION that serious consequences will arise from laws authorizing the recall of judges rests on doubtful grounds. It is a gross error to suppose that the majority of men will hasten to do everything that the law allows them to do. In fact, they do not exercise their liberty to practice what they preach. In his essay on "Civil Disabilities of the Jews," Macaulay remarked that it would seem as if a man who believes his eternal destiny to be already irrevocably fixed is likely to indulge his passions without restraint and to neglect his religious duties. Nevertheless, he continues, "it is altogether impossible to reason from the opinions which a man professes to his feelings and his actions." In "Democracy and Liberty," Lecky says, in another connection: "Of all the judgments of the great thinkers of the eighteenth century, none have been more signally falsified than those which they formed of the future of the Catholic church." If every law punishing persons "found intoxicated" — the phrase in the Connecticut statute — were repealed to-day, no one would expect that all adult males would sleep in the gutter to-night or see green monkeys and turkeys with straw hats by the end of the week, for other matters require and will receive their attention. Likewise, in our opinion, intemperate indulgence in recall elections is largely an imaginary dissipation.

Analogue of Recall Provisions.

IN Connecticut, the selectmen "*shall* convene a special town meeting on application of twenty inhabitants qualified to vote in town meetings." Conn. Gen. St. 1902, § 1793. The duty to call a meeting for any legitimate and proper purpose upon application of the requisite number of voters may be enforced by mandamus. *Lyon* v. *Rice,* 41 Conn. 245. In Vermont "the selectmen may call special town meetings when they deem it necessary, and *shall* call such meetings on the application of six voters." Vt. St. 1894, § 2974. Similar statutory provisions exist in other New England States. It is well known that, despite the ease with which six or twenty cranks can probably be found among the voters in comparatively populous towns, the selectmen are not pestered with frivolous applications to call special meetings. Perhaps a special meeting is called on petition in order to vote on a proposition to pay Widow Coe $12,000 for her homestead lot next to the town hall. This is because Dr. Reidy wants the lot, and if he gets it he will erect a building contiguous to the sidewalk, and with the similar building now abutting the sidewalk on the other side of the

town hall the latter will be rather deeply recessed between them. Then, too, the town hall must be speedily and greatly enlarged. Why not build a new one on Widow Coe's place? Anyhow, this is the town's last chance to buy her property. The foregoing is a fair sample occasion for a special town meeting. Making pins and needles and clocks and carriage bolts and cutlery and coffin trimmings and brass goods and firearms, et cetera, and inventing superior mouse traps, and machines that can automatically extract the square root of minus one, New Englanders are too busy to indulge in town meetings as a pastime. So in other communities it is not likely that the recall of judges between-times will prove to be a common diversion.

Divorce Court Judge Directing Criminal Prosecutions.

A BOSTON judge has issued an order that hereafter in all divorce cases before him, if the testimony discloses a statutory offense it shall be transcribed by a stenographer and transmitted to the district attorney, who will be expected to prosecute on the evidence. It is easy for a judge to act in this brave fashion and win the applause of the press where, as in Massachusetts, adultery is punished by imprisonment in the State prison for not more than three years or in jail not more than two years, or by a fine of not more than five hundred dollars; or, as in Maine, by imprisonment for not more than five years or a fine of not exceeding one thousand dollars; or, as in New Hampshire, by imprisonment not exceeding one year and a fine not exceeding five hundred dollars, or imprisonment not exceeding three years; or, as in Vermont, by imprisonment in the State prison not more than five years, or a fine of not more than one thousand dollars, or both; or, as in Rhode Island, by imprisonment not exceeding one year, or a fine not exceeding five hundred dollars; or, as in Connecticut, by imprisonment "not more than five years." But it is very doubtful if a judge takes any interest in the "pleasant vices" of litigants in civil cases in his court in Maryland, for example, where one who commits adultery shall be "fined ten dollars," or in Virginia, where "if any person commit adultery or fornication he shall be fined not less than twenty dollars."

Impressions of the Camorrist Trial.

ARTHUR C. TRAIN, formerly assistant district attorney of New York city and for many years a well-known literary man, is touring Europe in his automobile, and recently attended a few sittings of the court trying the Camorrists in Italy. Says a cable dispatch: "Mr. Train was impressed with the manner in which the judge conducts the trial. . . . Mr. Train was impressed by the characteristic Italian procedure and the system of confronting accuser and accused. He says that it is of great advantage in showing up the personality of prisoners and witnesses." Was Mr. Train present when a prisoner suddenly seized a detail of his personality, to wit, his glass eye, dramatically cast it on the floor, and then "threw" a fit, greatly impressing the native spectators? "That's a lie," was a common ejaculation of prisoners. Once upon a time a noted character and "fustian rascal," accompanied by his wife, met two other rogues on a London street. "Doll Tearsheet she by name" was absent for a reason stated by him a moment later, but unmentionable in this place. Well, here is an impressive "confronting" and a vivid "showing up of the personality:"

> *Nym.* Will you shog off? I would have you solus.
> *Pistol.* "Solus," egregious dog? O viper vile!
> The "solus" in thy most mervailous face;
> The "solus" in thy teeth, and in thy throat,
> And in thy hateful lungs, yea, in thy maw, perdy,
> And, which is worse, within thy nasty mouth!
> I do retort the "solus" in thy bowels;
> For I can take, and Pistol's cock is up,
> And flashing fire will follow.
>
> *King Henry V.*, Act II., sc. 1.

Exclusion of Uniformed Soldiers from Places of Amusement.

A FEW weeks ago the press throughout the country reported that two officers of the United States army who were refused admission to a skating rink in Arizona because of their uniforms intended to enter complaint to the United States District Attorney for the prosecution of the rink proprietor. If this proceeding is instituted, it will be the first prosecution under the Act of Congress passed March 1, 1911, which provides as follows:

"That hereafter no proprietor, manager, or employee of a theatre or other public place of entertainment or amusement in the District of Columbia, or in any Territory, the District of Alaska, or insular possession of the United States, shall make, or cause to be made, any discrimination against any person lawfully wearing the uniform of the Army, Navy, Revenue-Cutter Service or Marine Corps of the United States because of that uniform, and any person making, or causing to be made, such discrimination shall be guilty of a misdemeanor, punishable by a fine not exceeding five hundred dollars."

Could Congress constitutionally extend the act so as to make the discrimination criminal in the States? Apparently the framers of the act thought it could not. But unchecked discrimination might deter enlistments in the federal service. It is to be remarked, too, that *Civil Rights Cases,* 109 U. S. 3, holding the Civil Rights Act unconstitutional, is not at all in point; for one reason, because in such cases as these arising in Arizona it is the uniform, not the soldier, that is excluded. If he will detach himself from his uniform, his person will not be subjected to discrimination.

State statutes forbidding, in substance, the placing of representations of the United States flag upon articles of merchandise for purposes of advertising have been enacted in more than half of the States. See a list of those statutes in the note to the opinion in *Halter* v. *Nebraska,* 205 U. S. 24, 39, 27 S. Ct. Rep. 419, 10 Ann. Cas. 525. See also the cases collated in 4 Ann. Cas. 270, 10 Ann. Cas. 528. In the case above cited (*Halter* v. *Nebraska*) Mr. Justice Harlan, speaking for the Supreme Court, said:

"Looking then at the provision relating to the placing of representations of the flag upon articles of merchandise for purposes of advertising, we are of opinion that those who enacted the statute knew, what is known of all, that to every true American the flag is the symbol of the nation's power, the emblem of freedom in its truest, best sense. It is not extravagant to say that to all lovers of the country it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression. As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the State erred in duty or has infringed the constitutional

right of any one. On the contrary, it may reasonably be affirmed that a duty rests upon each State in every legal way to encourage its people to love the Union with which the State is indissolubly connected."

Therefore it may be inferred that a state statute designed to inculcate and enforce decent respect for the regulation uniform of a defender of his country would be pronounced unobjectionable.

Judgments against Gompers et al. Reversed.

MAY 15 the United States Supreme Court delivered a unanimous opinion, written by Mr. Justice Lamar, reversing the judgments of the District of Columbia Supreme Court and Court of Appeals under which Samuel Gompers, Frank Morrison, and John Mitchell were sentenced to terms of imprisonment ranging from six to twelve months, for violation of an injunction forbidding them to continue publication of notices of boycott against the Bucks Stove and Range Company. The contempt proceeding in the lower courts was instituted in the name of the complainant in the suit for injunction, and the error causing reversal was the infliction of imprisonment, whereas, the proceeding being civil in form, the only remedial relief possible was a fine payable to the complainant. The case is remanded "without prejudice to the power and right of the Supreme Court of the District of Columbia to punish by a proper proceeding contempt if any committed against it." The validity of the injunction order itself is expressly affirmed.

Regrettable Error in the Contempt Cases.

IN the contempt proceeding above noticed, the courts of the District of Columbia committed an unfortunate error. The Bucks Stove and Range Company has got so much advertising out of the litigation that the boycott may possibly have redounded to its financial benefit. But the sentences of the court were extremely severe, the mistake was originally committed especially by a judge whose court, if our memory serves us, was described in exceedingly contemptuous phrase on the floor of Congress last winter, and the flagrant error occurred in a species of proceeding nowadays regarded with such jealousy that it will hardly be able to survive a great many huge blunders. True, the error was only technical, but if Gompers and his associates are no further molested, the magnitude of the error will be commonly measured by the gravity of the consequences avoided by the reversal of the judgment. Violations of injunctions followed by condign punishment do not impair respect for a court of equity; but it will not be strange if the court's oversight of grave technical errors in a proceeding for imprisonment of its own foes is attributed by hostile critics to the blindness of rage.

Prisoner Daunted by Finger-print Evidence.

IN the Court of General Sessions in New York last month one Cæsar J. Cella, on trial for burglary, the sole evidence against him consisting of finger prints, was allowed in the middle of the trial to change his plea to a plea of guilty of the minor offense of unlawful entry. He admitted that the four finger marks found on a pane of glass in a loft building which he was charged with burglarizing were made by him, and explained that he had not supposed the prosecution could so thoroughly demonstrate the value of finger-print evidence. He had made four finger impressions for the police while he was in prison awaiting trial, and Lieut. Faurot, the finger-print expert in charge of the Bertillon bureau at police headquarters, testified with great positiveness that the prints on the pane of glass and those taken for the police were made by the same person. Francis Galton computed that there is "only one chance in sixty-four billions that two finger prints will be alike," that is, if they are the prints of the fingers of two different persons. The chances that the digital whorls and convolutions on the tactile areas of four fingers should be identical in their impressions from the hands of more than one individual are almost infinitely remote.

The signal success attending the production of the autoptic evidence prompted Judge Rosalsky to suggest to Lieut. Faurot that it would be an excellent idea for him to consult Mr. Albert S. Osborn, the "questioned document" expert, with a view of devising a method for further development of the finger-print science.

Certitude of Conclusion Based on Finger-print Comparisons.

THE newspapers reported that in the Cella case above noticed it was difficult to get a jury, "as few talesmen were willing to convict on the evidence of finger prints alone." When the prisoner's plea of guilty was accepted, "Gentlemen," said Judge Rosalsky, addressing the jury, "I am satisfied that you would have hesitated to convict this defendant on the evidence of finger prints alone." The foreman and several other jurors nodded their acquiescence, and on subsequent inquiry it was discovered that five of them would have refused to find a verdict of guilty without corroborative evidence. We hardly think that the jurors thereby argued their own stupidity. In cases where the genuineness of signatures is controverted, especially where wills are contested on the allegation of forgery, judges have uniformly concluded that if two or more signatures are found to be exact counterparts, it is certain either that all are spurious and traced from a common original or that one is genuine and the others traced from it. Moore on Facts, § 605. Speaking of that kind of evidence in *Matter of Burtis*, 43 N. Y. Misc. 437, 89 N. Y. Supp. 441, 447, Surrogate Wood in said (italics ours): "There appears in the case at bar a silent, convincing piece of evidence, furnished by the will itself, which, *independently of the expert evidence*, establishes beyond any reasonable doubt that the signature to the will propounded was not written by the decedent. . . . As the Appellate Division of the Supreme Court says in the Rice will case [81 N. Y. App. Div. 223, 81 N. Y. Supp. 68], *it does not need the testimony of experts* to demonstrate that the disputed signature is a tracing from the genuine." Now, it seems to us that the significance of finger-print evidence cannot be fully understood by triers of facts without an explanation of it by experts, and surely no intelligent jury will convict a person of crime *solely on the opinions of experts*.

After writing the foregoing we examined again and very closely the four thumb prints photographed under glass carrying uniform squares, which appear at the end of Mr. Osborn's splendidly illustrated treatise on "Questioned Documents." We confess that they are so wonder-

fully alike as almost to convince us that the exactitude of resemblance is even more decisive than the coincidence of superimposed traced and original signatures. Then, too, we recollect that in the Howland will case, 4 Am. Law Rev. 625, although Professor Benjamin Peirce, formerly of Harvard College, then superintendent of the Coast Survey, testified that the coincidences in the three signatures of Sylvia Ann Howland could have occurred fortuitously only once in the number of times expressed by the thirtieth power of five — which is 2,600 followed by eighteen ciphers — despite this testimony, counsel on the other side exerted himself with such success that he obtained from the representatives of John Quincy Adams and from several other persons a considerable number of returned checks, and patient comparison gave an extremely serious set-back to the theory that no two genuine signatures will ever cover.

Mathematical Probabilities and Improbabilities.

SUPPOSE it to be mathematically demonstrated in a criminal case that a physical fact admittedly irreconcilable with innocence has been proved with a possibility of error expressed by comparison between one and the thirtieth power of five. In view of the admitted, though inconceivably remote, chance of mistake would a jury be justified in refusing to convict the defendant, or would a judge be justified in setting aside a verdict of guilty? In *Day* v. *Boston, etc., R. Co.*, 96 Me. 207, 52 Atl. Rep. 771, a question with a similar metaphysical aspect was discussed by Judge Emery as follows:

"Of course, it is possible that he noticed the hand car. Indeed, it may be quantitatively probable that he did. Quantitative probability, however, is only the greater chance. It is not proof, nor even probative evidence, of the proposition to be proved. That in one throw of dice there is a quantitative probability, or greater chance, that a less number of spots than sixes will fall uppermost, is no evidence whatever that in a given throw such was the actual result. Without something more, the actual result of the throw would still be utterly unknown. The slightest real evidence that sixes did in fact fall uppermost would outweigh all the probability otherwise. Granting, therefore, the chances to be more numerous that the plaintiff's intestate did notice the hand car than that he did not, we still have only the doctrine of chances. We are still without evidence tending to actual proof. However confidently one in his own affairs may base his judgment on mere probability as to a past event, when he assumes the burden of establishing such event as a proposition of fact, as a basis for a judgment of a court, he must adduce evidence other than a majority of chances."

Now, in our supposed case we have assumed that there is a real and definite mathematical probability of error. This error *may* occur on the very first occasion where its presence is *possible*. In *Boylan* v. *Meeker*, 28 N. J. Law 274, 333, Mr. Justice Vredenburgh, speaking of the direct testimony of witnesses, said: "We cannot mark it as so many ounces, pounds, or tons, and yet we know that it may have all degrees of weight from the lightest feather to the most absolute moral certainty. All we can do is to note all the facts and circumstances carefully, and estimate its absolute and relative weight by the lights of conscience and experience." Conscience we have a-plenty, but all human experience is transcended by the number which denotes the probability of error in our supposed case. "Life is real, life is earnest;" let the prisoner produce at least a little evidence to rebut the mathematics of the situation. Would a candid man deny that there is a ponderable probability of confederacy in perjury by two or three reputable witnesses? Not denying it, would his conscience therefore forbid him to believe them?

Accumulation of Reports.

THE last bound volume of the New York Court of Appeals reports appeared in May. It is volume 200. The New York Supplement and New York Appellate Division reports are not very many years distant from the 200 mark. Other jurisdictions where the reports are now in the third century are United States Supreme Court 218 (Federal Reporter now at 185), Illinois Supreme Court, 247 ("Ill. App." at 156), Massachusetts 206, Missouri Supreme Court 229 ("Mo. App." at 149), Pennsylvania 228. After a while the book stacks in a law office having a sufficient library will force the lawyer to take himself and his desk and his lady stenographer with her appurtenances out into the hall.

NEW YORK WORKMEN'S COMPENSATION ACT — COMMENTS ON IVES v. SOUTH BUFFALO R. CO.

IN *The Outlook* for May 13, Mr. Roosevelt protests with characteristic energy against the decision of the New York Court of Appeals in *Ives* v. *South Buffalo R. Co.*, 201 N. Y. 271, 94 N. E. Rep. 431, a case described very fully in the May number of LAW NOTES. In the course of his thoughtful and judicious discussion Mr. Roosevelt says: "I have received from one of the most eminent jurists, and one of the most genuinely conservative — and therefore genuinely progressive — men in the United States, a comment on this New York decision which puts the case so admirably that I quote it almost in full." We confidently believe we could name Mr. Roosevelt's correspondent in a single guess. If our surmise is correct, he is, indeed, as Mr. Roosevelt says, an eminent jurist — also greater, we sincerely hope, hereafter — and possesses a mind imbued with common sense. In his comments, quoted by Mr. Roosevelt, he says: "The point in the decision that 'due process' means the procedure which was enforced when the Federal Constitution was adopted, has been repudiated again and again by the Supreme Court of the United States." Granted, for the sake of argument. What then? Mr. Roosevelt's eminent jurist, whoever he may be, cannot be ignorant of the universal and unquestionably sound rule that a correct decision is not to be impeached on account of erroneous reasons that are given for it.

In the *Outlook* article Mr. Roosevelt lays greater stress than his correspondent upon the error which, as above, we have conceded for present purposes. But the jurist merely mentions it, and then proceeds to argue the relevant points that "the law could have been sustained as a proper exercise of the police power upon either of two grounds: (1) Society has the right to require any business which directly produces orphans, widows, and cripples to provide for their support. (2) The most effective method of compelling dangerous employments to safeguard their employees is to make them financially responsible for injuries." These propositions do certainly and strongly

invite assent. All positive affirmations are apt to do that. Let us briefly examine proposition (1), namely, that "any business which directly produces orphans, widows, and cripples" may properly be required to provide for their support. Is any business more directly and frequently productive in that line than the operation of street railways in respect of pedestrians, or of steam railroads at grade crossings? Do the critics of the decision in the Ives case contend that the legislature may constitutionally impose upon those companies liability in all such cases irrespective of negligence or delinquency of any other kind? Possibly they do. If so, we think we are clearly entitled to urge that the burden of proof rests upon them to justify their contention by showing legal grounds for it, and that it is entirely insufficient and rather disingenuous for them to allow that contention to remain latent in proposition (1) above quoted, which was framed for a different purpose. On the other hand, if they balk at imposition of absolute liability on railroad and street railway companies, it is equally incumbent upon them, in our opinion, to show why their theory would not support the constitutionality of such legislation.

In the first place, it cannot be denied that the question in the Ives case must be decided according to *law* and is not to be settled by a *sic volo sic jubeo* rule. In the Ives case Judge Werner says a contention "that the constitutions protect only those rights which the legislatures do not take away" would be an "absurdity." We can hardly believe that even a judge elected on a "recall" ticket would quarrel with that statement. In the next place, every member of the legal profession will admit that there is such a thing as "the police power." Judge Werner says "it is a power which is always subject to the Constitution." Surely the legal critics will not deny that. It is the unanimous opinion of the highest court in New York State that the Workmen's Compensation Act overleaps the constitutional barrier. The court elaborately states its reasons for that conclusion with no lack of courage in replying to opposing arguments and frankness in distinguishing classes of cases claimed to be inconsistent with the ruling. Judge Werner's opinion dodges nothing. Now, we hold that the burden of proving error rests heavily upon those who differ with the court, and that this burden is in no material degree supported by showing that the court's description of due process of law is not exactly correct, or by baldly asserting a duty to provide for "orphans, widows, and cripples." The burden is upon the critics to propound a delimitation of the police power so definite that it is susceptible of adoption as *law*, and so capable of being applied to future cases as clearly in the mind's view as the railroad or street railway company's liability to persons on its track that the court may know how, in such cases, to render decisions satisfactory to those critics. By the way, the Workmen's Compensation Act requires a higher degree of care on the part of an employer toward an employee than the law now exacts from common carriers toward their passengers, who, like employees, are sometimes killed or crippled. But it is of course arguable that the relation of employer and employee might properly be regulated by a compensation act on the ground that the employer is presumed to derive pecuniary profit from the relation, and may also recoup for payments under such an act by charging more for his product, while the power of railroad and street railway companies to indemnify themselves by increasing their rates would be subject to constitutional regulations of a state railroad commission.

In proposition (2) Mr. Roosevelt's jurist says that "the most effective method of compelling dangerous employments to safeguard their employees is to make them financially responsible for injuries." Yes; but no law can forbid the employer to safeguard *himself* by discontinuing his business. At least, it is conceivable that he would suspend operations during a period of hard times rather than continue with a prospect of ordinary loss *plus* a possible heavy liability for injuries to employees without his fault. We recollect reading a case decided a few years ago either in Minnesota or in Wisconsin where the court sustained a verdict for many thousands of dollars in favor of a servant against an employer with a moderate amount of capital invested, and, turning over the leaves of reports that were a little later, we took notice of a case incidentally revealing the fact that the employer was in involuntary bankruptcy. Thereupon we put two and two together, as the phrase goes.

In the *Outlook* article Mr. Roosevelt remarks that "when the Supreme Court of Connecticut, through Chief Justice Baldwin, now Governor of that State, rendered a decision akin to that rendered by the Court of Appeals on the same general subject, but even more extreme, this decision was circulated by the great railway corporations very widely before the legislatures and courts in other States in order to prevent or nullify legislation designed to secure compensation to workingmen." Then, referring to the Ives case he says:

> "Exactly similar action is now being taken in connection with this decision of the New York Court of Appeals. For instance, I hold before me a pamphlet submitted to the legislature of the State of Minnesota on behalf of the proposed Workmen's Compensation Act in that State. This pamphlet, which is submitted by the commissioner of labor of the State of Minnesota, calls attention to the fact that documents quoting the decision of the New York Court of Appeals, intended to frighten the legislature of Minnesota into nonaction, have been circulated before it."

These tactics on behalf of "the interests" are of course within their rights, perhaps natural, and possibly not destitute of wisdom. But by reflex mental operation the dispassionate observer is compelled to recollect the futility of similar efforts of the liquor interests to stay the steam-roller advance of the "police power," which, in some States, with the assent of the United States Supreme Court, almost utterly destroyed valuable brewery and distillery properties, and everywhere firmly established stringent civil damage acts, so called, and the like. At the same time, this brings us around in the neighborhood of our first reply to the *Outlook's* criticisms of the Ives case. Has the public an unrestrained liberty to execute its will on behalf of employees against employers in precisely the same spirit as it has proceeded against common rum-sellers?

Mr. Roosevelt and his legal mentors are welcome to the following small contribution to their store of ammunition. In *Halter* v. *Nebraska*, 205 U. S. 34, 27 S. Ct. Rep. 419, 10 Ann. Cas. 525, a Nebraska statute making it a misdemeanor for any one "to sell, expose for sale, or have in possession for sale, any article of merchandise, upon which shall have been printed or placed, for purposes of advertisement, a representation of the flag of the United

States," was held to be a constitutional exercise of the police power — the power to "provide not only for the health, morals, and safety of its people, but for the common good, as involved in the well-being, peace, happiness, and prosperity of the people," as the court described it. A further and pertinent quotation from the opinion will be found in an editorial comment in this number of LAW NOTES. Now, the right of a dealer to put a conspicuous device upon his goods for the purpose of attracting the attention of buyers and also to enable any one to identify the goods at a glance is undoubtedly a property right. And it is so valuable that the corporation owning the word "Uneeda" would probably estimate the property to be worth more than all the money it would ever be called upon to pay to its employees under a workmen's compensation act. No lawyer with a regard for his professional reputation would give genuine support in any legislature to a bill proposing to deprive the corporation of the right to use that word on its packages. But the United States Supreme Court (Mr. Justice Peckham dissenting) held that the property right abolished by the Nebraska statute was inferior in dignity and substance to *the cultivation of a feeling*. Are not the life and health of citizens — men competent to bear arms in defense of the nation — more valuable assets of the state than a conjectural and perhaps finical patriotic sensibility?

CHARLES C. MOORE.

SUMMARY CONVICTION AND PUNISHMENT FOR PERJURY.

COMPLAINTS of the prevalence of perjury in the courts are perennial. They appear everywhere. "The extent of the evil is astonishing," says Edward J. McDermott, Esq., vice-president of the Kentucky State Bar Association, in an article on "Needed Reforms in the Law of Expert Testimony" in the *Journal of Criminal Law and Criminology* for last January.

As a preventive remedy why not try the efficacy of convictions by the court, without a jury, for perjury as a *contempt of court*? If specific statutory authority is needed, let a statute be enacted. But is such a statute indispensable, in the absence of a statute impliedly making prosecution by indictment and a jury trial an exclusive remedy? "Perjury is undoubtedly a great contempt of court," said Park, J., in *Stockham* v. *French*, 1 Bing. 365. See also *Chicago Directory Co.* v. *United States Directory Co.*, 123 Fed. Rep. 194. Perjury by a witness delivering testimony in court is a punishable "misbehavior" in the court's presence within the meaning of U. S. Rev. St., § 725, 4 Fed. St. Ann. 534. So stated in *Ex p. Bick*, 155 Fed. Rep. 908. See also *Doniphan* v. *Lehman*, 179 Fed. Rep. 173. It is clear that one accused of contempt of court has no constitutional right to a trial by jury. *In re Debs*, 158 U. S. 594, 15 Sup. Ct. 900.

By the ancient rule of the common law the testimony of two witnesses, both directly contradicting the defendant's oath, was required to convict of perjury, for the testimony of one witness would simply be one oath against another. The reason for the rule is stated in *State* v. *Miller*, 24 W. Va. 802, 807. But this rule has long been relaxed, and it is now held that perjury must be proved either by the testimony of two witnesses, or by that of one witness supported by proof of corroborating circumstances, and that such proof is sufficient. 22 Am. & Eng. Encyc. of Law (2d ed.) 694. There is little doubt, however, that the legislature may constitutionally deprive the common-law rule of its arbitrary and mandatory character, and allow the weight of the evidence to be determined by the ordinary rules of human experience. See McGehee, Due Process of Law, p. 180 *et seq.* The New York Penal Law, § 1627 (formerly Penal Code, § 101*a*) provides that in a proposition for perjury the falsity of the statement is "presumptively established" by proof of defendant's statement "under oath to the contrary thereof." The constitutionality of the provision has not been determined, but seems hardly questionable.

Nor would it be quite correct to say that all the reasons for the common-law rule prescribing the quantum of evidence necessary to authorize a jury to convict a person of perjury would hold good on a trial of the same issue by a judge alone; for the judge might be aided by an item of evidence that could not be satisfactorily adduced to a jury, namely, his ocular observation of the defendant's demeanor when the alleged false testimony was given, and his direct knowledge of various significant facts perceptible in the defendant's method of answering or evading questions. In *State* v. *Miller*, 24 W. Va. 802, 807, it was held that when a defendant on trial for perjury testifies in his own behalf "the jury then is the sole judge of the weight to be given to his evidence, and the legal presumption of the truth of his statements previously made is removed, and the manner of the witness in giving his evidence may be sufficient corroboration of the prosecuting witness."

Section 41*a* of the Bankruptcy Act of 1898 provides that "a person shall not, in proceedings before a referee, . . . after having taken the oath, refuse to be examined according to law." And upon certificate of the referee that a person has violated this provision "the judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court." In *In re Gitkin*, 164 Fed. Rep. 71, 73, the court held that "an 'examination' requires that questions shall be answered and answered truthfully." And in the following cases bankrupts were sentenced to imprisonment, under the provision above quoted, for committing perjury: *In re Fellerman*, 149 Fed. Rep. 244; *Ex p. Bick*, 155 Fed. Rep. 908; *In re Singer*, 174 Fed. Rep. 208; *In re Schulman*, 167 Fed. Rep. 237. See also *In re Gordon*, 167 Fed. Rep. 239; *In re Gitkin*, 164 Fed. Rep. 71; *In re Bronstein*, 182 Fed. Rep. 349. In none of those cases did the court seem to be embarrassed by the common-law rule touching the necessary quantum of evidence; indeed, no allusion was made to that common-law rule.

In common-law courts a person proceeded against as for a contempt had a right to purge himself, if he could, by his own oath, but could then be indicted for perjury if he swore falsely. 7 Am. & Eng. Encyc. of Law (2d ed.) 71, 72. But this rule did not obtain in the chancery courts, and is disregarded in our bankruptcy courts, these

being courts of equity, and we perceive no reason why it could not be entirely abolished by statute, if necessary, thus giving the judges of all courts the same summary power that is now exercised by judges in bankruptcy courts.

Judges incessantly declare that the summary power to punish for contempts tending to obstruct the administration of justice is essential to the execution of their powers and to the maintenance of their authority. If they deem it a valuable means for suppressing the turbulence of strikers or other contemners of judicial process, wouldn't it be potent to discourage perjury in their courts? Among the objections urged against the bill pending in the Massachusetts legislature and providing for a jury trial in certain cases of contempt of court (discussed in an article in the May number of LAW NOTES) are: "because of the delay and of the character of jury trial," and "the difficulty of obtaining convictions beyond a reasonable doubt," and because "the certainty that violations of these injunctions would be speedily punished as a contempt has resulted in well-nigh uniform compliance with the orders of the court in equity."

In an article in *Bench and Bar* for January, 1907, on "How to Stop Perjury," Mr. Justice Gaynor insisted that "the chief responsibility for such perjury in the courts is with the trial judges themselves, because they have the power to summarily and effectively stop it and do not stop it." He quoted the New York Penal Code, § 102 (now Penal Law, § 1628), which is a statute 118 years old, authorizing a judge to "immediately commit . . . for his appearing and answering to an indictment for perjury" any witness who, he thinks, has been guilty of the offense. "Some of the trial judges in Kings county in the Supreme Court and in the County Court have in recent years summarily committed perjurers under this statute, and the effect was surprising," he said. "Cases on the day calendar were speedily abandoned after such a commitment — some necessary 'witness' would not come to the scratch, as the saying is — and the length of the day calendar had to be increased for a week, or even for weeks, thereafter in order to get ready cases enough to keep the parts of court busy. On the daily call cases fell by the wayside in unusual numbers." And this deterrent effect was produced by the prospect of a jury trial for perjury in the more or less distant future.

Some of the Brooklyn, N. Y., judges have lately declared, when imposing severe sentences, that their purpose is to diminish the migration of criminals to that city. If those judges, without the intervention of a jury, should send a few perjurers to jail, wouldn't they acquire a reputation that would quickly be reflected in a diminution of false swearing in their courts?

INDIANA STERILIZATION ACT.

AN Indiana statute enacted in 1907 begins with a "whereas" preamble declaring that "Heredity plays a most important part in the transmission of crime, idiocy, and imbecility," and then provides as follows:

"That on and after the passage of this act it shall be compulsory for each and every institution in the state, intrusted with the care of confirmed criminals, idiots, rapists and imbeciles, to appoint upon its staff, in addition to the regular institutional physician, two (2) skilled surgeons of recognized ability, whose duty it shall be, in conjunction with the chief physician of the institution, to examine the mental and physical condition of such inmates as are recommended by the institutional physician and board of managers. If, in the judgment of this committee of experts and the board of managers, procreation is inadvisable and there is no probability of improvement of the mental condition of the inmate, it shall be lawful for the surgeons to perform such operation for the prevention of procreation as shall be decided safest and most effective. But this operation shall not be performed except in cases that have been pronounced unimprovable."

These "skilled surgeons," the "institutional physician" and the "chief physician" and the "board of managers" are to pass upon the advisability of inflicting an irreparable physical disability upon the confirmed criminal or other defective. If they deem it "inadvisable" that the possibility of progeny shall continue they may summarily abate it by an operation. Ditto if in their judgment "there is no probability of improvement." What are the grounds upon which this advisability or probability is to be determined? Are they purely medical, or do they involve consideration of factors that can be more accurately weighed by non-medical specialists who have observed and systematically studied criminals outside of public institutions and in their native element? For example, is lack of "probability of improvement" satisfied by absence of probability of *moral* improvement, or of probability of regeneration with Divine aid?

> Consideration, like an angel, came
> And whipp'd the offending Adam out of him,
> Leaving his body as a paradise,
> To envelope and contain celestial spirits.
> Never was such a sudden scholar made;
> Never came reformation in a flood,
> With such a heady currance, scouring faults;
> Nor never hydra-headed wilfulness
> So soon did lose his seat and all at once
> As in this king.
>
> *King Henry V.*, Act I., sc. 1.

If those lines expressed the author's private convictions as to possibilities, will the Indiana medical experts agree with the immortal expert in human nature?

"Confirmed criminals" are subjected to the jurisdiction of the surgeons and physicians. By whom is their status as "confirmed" offenders to be determined? The use of the word clearly indicates that they must not be ordinary offenders. But in the excellent index to Burns's Revision of 1908 we do not find a word about "confirmed criminals." The phrase itself is not an index title, and we are unable to identify it anywhere in the titles "Criminal Offenses" and "Criminal Procedure," or in divers sections of text that we have read. Are these professional gentlemen possessed with delegated legislative powers — are they legislators and judges too?

Upon what meat do these Indiana surgeons and physicians feed, that they become so capable *eo instanti* they are employed by the State? No Indiana statute, as far as we have seen, requires a special examination as a condition precedent to their appointment. "Skilled surgeons of recognized ability." Recognized by whom? Is there any formal record of this recognition? Do they take an oath to discharge their duty faithfully? Perhaps they do, under the general statutory requirement that every incumbent of an "office" must be sworn.

They are authorized to perform such operation "as shall

be decided safest and most effective." Can they lawfully *castrate* one whom they have adjudged to be a "confirmed criminal" and beyond the "probability of improvement," instead of performing the simple operation of vasectomy? The Indiana Constitution provides that "cruel and unusual punishment shall not be inflicted." By the ancient common law of England one who committed mayhem by castration "was sentenced to lose the like part." But even this limited employment of castration as a punishment "went afterwards out of use . . . partly because, upon a repetition of the offense, the punishment could not be repeated," says Blackstone. 4 Black. Com. 206. *"Any punishment which, if ever employed at all, has become altogether obsolete, must certainly be looked upon as 'unusual,'"* said the distinguished chief justice and author of "Constitutional Limitations." Cooley Const. Lim. (6th ed.) 403. The common-law felony of mayhem is a very grave statutory offense in Indiana. We have read Chief Justice Baldwin's expressions of opinion, as quoted in the New York *Tribune* for May 14. Nevertheless, if a board of physicians and surgeons shall contemplate operating by castration upon criminals, under the supposed authority of the Indiana Act of 1907, we think that common prudence would advise them to consult an Indiana lawyer for confirmation of the foregoing authorities and for his opinion of their potency.

An act of the New Jersey legislature authorizing the sterilization of the hopelessly defective and criminal classes was signed by Governor Wilson early in May. It is substantially a copy of the Indiana statute above quoted and discussed, with the addition, however, of important provisions for the assignment of counsel, if requested, a hearing before a judge of the Court of Common Pleas, and a review by the Supreme Court or a justice thereof. In some other material particulars the enactment was more carefully drawn than the Indiana statute. Quite likely the operation of vasectomy, or one equally innocuous, was contemplated by the legislature. But it does not forbid, and indeed impliedly authorizes, castration. Similar acts have been passed in several other States. Perhaps in a future number of LAW NOTES we shall discuss their constitutionality.

CONTRACTS TO INDEMNIFY BAIL.

IN *U. S.* v. *Ryder,* 110 U. S. 729, it was held that there is no implied liability on the part of a person arrested for crime to indemnify his bail for what they have been compelled to pay on their recognizance by reason of his default. In a very late case in the Circuit Court of Appeals, not at our hand just now, it was held that an express contract to indemnify in such a case is void as against public policy. On this point there is a conflict of authority in the State courts. See cases in 16 Ann. Cas. 1036, note. But in jurisdictions where the courts refuse to enforce the contract the rule can be evaded, on familiar principles, by the device of exacting an actual deposit in the hands of the bail of money to indemnify him. Before accepting such deposit, however, we advise individuals, surety companies, and their attorneys to sit up and take notice of *Rex* v. *Porter,* [1910] 1 K. B. 369. That was a case in the Court of Criminal Appeal, appealed from a conviction on an indictment for conspiracy. One Clark had been committed by justices for trial at a quarter sessions on a charge of felony. The alleged conspiracy, of which Porter was convicted, consisted of an agreement between himself and Clark and one Brindley that if Porter and Brindley, pending the charge against Clark, would go bail for the latter in £50, then Clark would give them £50 each as security, so that they would lose nothing if he absconded. The facts were specially so found by the jury, together with a finding "that the appellant [Porter], in becoming a party to that agreement, did not do so with the intention that Clark should abscond;" and, moreover, the count in the indictment on which the appellant was convicted contained no averment of intent, but a bare statement of the agreement as above related. Jelf, J., in the court below, held that Porter was guilty of a criminal conspiracy, and this was affirmed by the Court of Criminal Appeal. Lord Alverstone, C. J., writing the opinion, after citing several cases said:

"It is, in our opinion, difficult to conceive any act more likely to tend to produce a public mischief than that which was done in this case. It is to the interest of the public that criminals should be brought to justice, and, therefore, that it should be made as difficult as possible for a criminal to abscond; and for many years it has been held that not only are bail responsible on their recognizance for the due appearance of the person charged, but that, if it comes to their knowledge that he is about to abscond, they should at once inform the police of the fact. It has been suggested to us that the more modern view of bail is that it is a mere contract of suretyship, and that an agreement to indemnify bail, therefore, does not involve any illegality. If that were so, as soon as the bail had got his indemnity, he would have no interest whatever in seeing that the accused person was forthcoming to take his trial, and it is obvious that criminals, particularly if possessed of means, would very frequently abscond from justice. We have been asked to follow the opinion expressed by Martin, B., in *Reg* v. *Broome,* 18 L. T. (O. S.) 19, that there is no objection to the indemnification of bail, which opinion was acted on by the recorder of London in *Rex* v. *Stockwell,* 66 J. P. 376. It is sufficient to say that we do not agree with the opinion of Martin, B. In these circumstances we are of opinion that Jelf, J., rightly held that the agreement entered into by the appellant was an illegal contract, not only in the sense of being unenforceable, but also as being one which clearly tended to produce a public mischief, and that it amounted to a criminal conspiracy, without any necessity for a finding by the jury that there was an intent to pervert or obstruct the course of justice."

Thus it was adjudged to be an offense at common law. There are no common-law offenses against the United States, and we do not find a federal statute that would cover a transaction like that before the Court of Criminal Appeal. But in many of the States a prosecution would be successful if the opinion of Lord Alverstone and his associates is to be accepted as sound law.

"I SHALL ever deem it more honorable, as it is, undoubtedly, more useful, to retract than to adhere to a hasty or incorrect opinion." *Per* Judge Roane in Leigh's Case, 1 Munf. (Va.) 468, 480, where, on a rehearing, the majority of the court receded from a "sudden and off-hand opinion . . . formed and delivered upon an insulated view of the subject, and under circumstances which precluded a due consideration of the question."

PIECING TOGETHER TORN PAPER.

SIMPLE as this kind of work appears, yet it no less offers numerous difficulties and is often very awkwardly carried out. An investigating officer often receives torn pieces of paper of small size, not infrequently of the utmost importance when pieced together. For this purpose we procure a plate of glass, or better still some tracing cloth of good quality and transparency stretched on a board and fastened with four drawing pins. The pieces of paper are then set out, preferably on a dark background, and we first try to distinguish the back from the front of the paper, by noting, *e. g.*, whether one side is written on and the other not, or one side is darker than the other. If possible, the pieces of paper are all placed the same side up. We then look for those pieces which have two clean cut sides and which necessarily form the corners of the sheet. On these being found they are placed in their respective places and give us four very useful fixed points. We then look for all the pieces which have only one clean cut side, and divide them into four groups according to whether the cut edge is on top or at the bottom or the left or right sides. This is as a rule not difficult owing to the writing generally found on the paper. These lateral pieces are placed in position, using the corner pieces for guidance, and with luck an entire frame is obtained into which the remaining pieces are filled in after some adjustment. This done the pieces are gummed on the plate of glass or the tracing cloth, one after the other in the order in which they lie, commencing at the top left-hand corner, care being taken to bring the various edges as close together as possible. While this is being done it must be remembered that the tears are hardly ever perpendicular to the surface of the paper, but are generally directed towards the right on the upper surface of the paper and the left on the lower surface, thus forming an oblique surface of separation. In this case the edges must be exactly slipped in, one under the other. The pieces should, therefore, be only partially gummed at first, and only when the piece which has to be slipped under the first is in position should they be finally gummed down. Never gum to a nontransparent plate even when there is nothing on the back of the paper, for in some cases the inquiry may turn on the question of why there is nothing on the back.

There is another method, which, however, requires much more pains. In this process we use perfectly clean (by preference distilled) water, with which the fragments are carefully moistened before being brought to the right position on a glass plate. They stick with water smoothly and securely to the plate. When this is done, then a second glass plate is laid on the paper of exactly the same size as the glass plate underneath, so that the paper is enclosed between two glass plates. Then follows a thorough drying, the plates not being touched until the water between them is evaporated. Gentle warmth will assist when one goes carefully to work. The plates are then safely and hermetically bound together with pasted slips of soft tough paper. This is the method used by the director of the Court Library in Vienna, Professor Karabacek, to preserve valuable papyrus records.

If the paper in question has been written with copying ink, care must be taken not to moisten the paper. In that case naturally no good copy can be obtained.

When the paper has been submitted to certain processes rendering it illegible, recourse must be had to photography; this never fails to assist us. A sheet of paper was exhibited at the Chicago Exhibition of 1893, the writing on which had been made quite illegible by rubbing and mastication, side by side with the photograph of the same sheet. The undecipherable traces left on the paper became perfectly legible in the photograph.

The following case will show how important is the piecing together of torn paper:

One morning a peasant, an old man of considerable means, came before the investigating officer and declared that he had been shot the night before. He narrated how he had started from a place called St. and had followed the main road through the village of J. with the object of proceeding to G. While passing before a roadside cross, near a forest, a man advanced and demanded of him his money and watch at the mouth of a revolver. The peasant had turned away, whereupon the highwayman snatched his watch and at the same time fired. The bullet entered his right ear, the robber made off, and the peasant remained for a considerable time beside the cross in a state of unconsciousness. On coming to his senses he returned to the village of J. to seek the assistance of the doctor of that place. The latter dressed the wound and sent him in a carriage to the hospital. The medical examination revealed a hole produced by a bullet extending from the ear towards the buccal cavity. The peasant having given an exact description of the author of the crime, police were sent out to arrest him, and the investigating officer went off to the scene of the occurrence.

He was then most astonished to notice that the large pool of blood produced while the peasant lay wounded and unconscious on the ground was situated in the turf behind the cross, which was a large stone one, whereas the road where the attack was said to have taken place passed in front of the cross. This circumstance induced the investigating officer, who had no other clue, to repass along the road traversed by the peasant while going to the doctor and take the precaution of being accompanied by a police officer.

Here was found the only clue which might enable some light to be thrown on the concomitant circumstances. When close to J. the investigating officer noticed some small pieces of torn paper behind a heap of stones. The largest of these pieces bore the words "to live." The paper thus seemed to be important, and a search was made for all the pieces of paper. This was by no means easy, the wind having scattered them over a field of stubble. Fortunately the school children turned up on the road and gave willing aid in the search on being promised a kreutzer (2 pies) for each piece of paper. Since the police had arrested two lads on suspicion of the crime, and the injured peasant was on his deathbed, it was necessary to establish with all haste what connection, if any, these pieces of paper had with the case. Half a night's work sufficed to arrange and join the pieces on a glass plate. The contents established that the peasant, overwhelmed by a lawsuit he had just lost, and being, besides, in a bad state of health, had made up his mind to do away with himself; he bade farewell to his wife, by whom he had had no children, leaving her his property, and named as heirs two illegitimate sons. On this writing being shown to him the old peasant made a complete confession, stating that he had fired the shot himself behind the cross, but on coming to his senses had regretted his act and referred to the doctor at J for assistance. On the way there he had taken care to tear up and throw away the letter of farewell he had previously written, which was to take the place of a will. He died shortly after his confession. The reconstructed document not only gave the two lads who had been arrested their liberty, but also assured the two sons of the peasant, who had never been recognized, a considerable fortune.

In conclusion it may be remarked that one can save paper in a bad condition if one moistens it with the solution mentioned on page 453 (to be obtained from dealers in photographic articles). Important papers are often much crumpled, also, when kept in damp, dirty places or found near burial grounds or in water, full of bacteria, which soon lead to decay. If such papers are much handed about between lawyers and witnesses,

unfolded, smoothed out and folded up again, they soon become unreadable and only an expert can handle them. Treatment makes the paper strong, solid, and proof against bacteria, in short, so far as regards ordinary handling, almost indestructible. — From *Criminal Investigation*, by Dr. HANS GROSS.

Cases of Interest.

ASSAULT WITH DEADLY WEAPON. — In People *v.* Montgomery, (Cal. App.) 114 Pac. Rep. 792, it was held that the pointing of an unloaded gun at the prosecuting witness, accompanied by a threat to shoot him, without any attempt to use it otherwise, was not an assault with a deadly weapon, for want of ability to commit a violent injury on the person in the manner attempted.

FALSE TEETH AS NECESSARIES. — In Smith *v.* State, (Wis.) 130 N. W. 894, it was held that artificial teeth were "necessaries" which a husband was bound to furnish to his wife. The court said: "It is a matter of common knowledge that artificial teeth are most useful and necessary articles for the promotion of personal comfort and health, and that their use in this country has attained practical universality. We consider that such teeth come within the class of articles constituting 'necessaries' which a husband may be bound to furnish his wife."

FENCE ABOUT A BUILDING AS A "CURB." — In Domke *v.* Gunning, (Wash.) 114 Pac. Rep. 436, it was held that a "curb" within the meaning of a city ordinance making it the duty of a person driving an automobile on the streets of the city "upon turning the corner of any street" to "leave a space of at least six feet between the curb and the . . . automobile" included a fence which had been constructed about a corner where a building was in process of erection, it appearing that pedestrians traveling along the street on reaching the corner were obliged to leave the regular walk, step into the street, and walk around the outside of the fence. The court said: "The purpose of the ordinance was to keep vehicles in rounding corners out of the path usually taken by foot passengers, and the word 'curb' was used as the most convenient term to mark one of the boundaries of the path, and not in a technical sense. When a fence was used to mark the boundary of this path, it became the curb within the meaning of the ordinance."

BEQUEST OF MONEY FOR PURCHASE OF ANNUITY. — In Parker *v.* Cobe, (Mass.) 94 N. E. Rep. 476, the court followed the settled law of England and held that a bequest of money to be used in the purchase of an annuity gives the legatee a right to the money and he can insist that the annuity shall not be bought. The court said: "This rule has found its most frequent application in case of bequests to be laid out in the purchase of annuities. But it is a general rule applicable to a bequest to be laid out in the purchase of any object. . . . The reasoning on which the rule is established is that the legatee can sell the particular object as soon as it is bought and the law will not require the performance of the nugatory act. Consequently it is of no consequence that the particular object is to be bought by the executor and not by the legatee."

ENJOINING SUNDAY THEATRICAL SHOW. — In Lyric Theater Co. *v.* State, (Ark.) 136 S. W. Rep. 174, which was a suit instituted in the name of the state of Arkansas on the relation of the prosecuting attorney of one of the judicial circuits of the state to enjoin the giving of any vaudeville or moving picture shows upon Sunday in a theatre conducted by the defendants in the city of Fort Smith, it was held that, assuming that the defendants were violating the law against sabbath breaking or the law against maintaining a public nuisance, an injunction would not lie, as no civil property rights or privileges of the public were affected by the giving of the performance, and therefore there was no ground shown for the exercise by a court of chancery of the power to issue a writ of injunction. The court said: "It is true that courts of equity have jurisdiction to enjoin acts constituting public nuisances and to abate them. But such jurisdiction is interposed solely for the protection of property or of civil rights; and, whether the nuisance be private or public, the same principle must guide the interference of a court of equity in both cases. In the absence of an injury to property or to civil rights, the chancery court has no jurisdiction to restrain acts simply because they are criminal, nor has it the power to enforce the performance of moral duties solely as such."

LIABILITY FOR DEATH CAUSED BY DELIRIUM TREMENS ACCELERATED BY INJURY. — In McCahill *v.* New York Transp. Co., (N. Y.) 94 N. E. Rep. 616, which was an action by an administratrix against the New York Transportation Co., it appeared that one of the defendant's taxicabs struck the plaintiff's intestate on Broadway, in the city of New York, in the nighttime under circumstances which, as detailed by the most favorable evidence, permitted the jury to find that the former was guilty of negligence and the latter free from contributory negligence. As a result of the accident the intestate was thrown about twenty feet, his thigh broken, and his knee injured. He immediately became unconscious, and was shortly removed to a hospital, where he died on the second day thereafter of delirium tremens. A physician testified that the patient, when brought to the hospital, "was unconscious, or irrational rather than unconscious. . . . He rapidly developed delirium tremens. . . . I should say with reasonable certainty the injury precipitated his attack of delirium tremens, and understand I mean precipitated, not induced." And, again, that in his opinion "the injury to the leg and knee hurried up the delirium tremens." He also stated: "He might have had it (delirium tremens) anyway. Nobody can tell that." It was undisputed that the injuries could not have led to delirium tremens except for the pre-existing alcoholic condition of the intestate. It was held that the defendant's negligence was, legally speaking, the proximate cause of the intestate's death and that the defendant was liable in damages for the death. The court applied the rule that one who has negligently forwarded a diseased condition, and thereby hastened and prematurely caused death, cannot escape responsibility even though the disease probably would have resulted in death at a later time without his agency.

GIVING ACCUSED OPPORTUNITY TO SHOW CAUSE WHY SENTENCE SHOULD NOT BE IMPOSED. — In People *v.* Nesce, (N. Y.) 94 N. E. Rep. 655, it was held by the New York Court of Appeals to be reversible error to sentence a person against whom a verdict of murder in the first degree had been found, without giving him an opportunity to show cause why sentence should not be pronounced against him. But the court, instead of granting a new trial for the error committed, as was done in Messner *v.* People, 45 N. Y. Rep. 1, remitted the case to the trial court to proceed upon the verdict in accordance with the requirements of the law. The court said: "The right of a defendant to speak for himself, after conviction in capital cases, is one of substance and should be carefully guarded. It is the last opportunity that the law affords him of speaking for himself and showing cause, if he is able to do so, why judgment should not be pronounced against him. This right, given by the common law and now incorporated into our statute, compels the courts to accord him the privilege, and no court has the right to deprive him of it. The trial, however, terminates with the verdict of the jury. The statute then steps in and gives the defendant two days' time to determine whether further legal

proceedings should be taken in arrest of judgment, unless it should be the last day of the term of court, or he consents to waive the statutory time. Under the provisions of the Code of Criminal Procedure additional powers have been given to this court in the review of capital cases. The error which was committed in the passing of judgment occurred after the trial and the verdict of the jury. We therefore are of the opinion that, under the increased powers of this court given by the legislature, it no longer becomes necessary to grant a new trial for errors of this character, and that all of the rights of the defendant may be fully protected by a reversal of the judgment and a remitting of the case to the Supreme Court to proceed upon the verdict in accordance with the requirements of the law."

PRACTICING "CHIROPRACTIC" WITHOUT A LICENSE. — In State *v.* Johnson, (Kan.) 114 Pac. Rep. 390, it was held that a statute creating a state board of medical registration and examination and regulating the practice of medicine, surgery, and osteopathy, was constitutional and embraced within its terms one who without registration, examination, or license from such board, and for pay, practiced or attempted to practice chiropractic by pretending to adjust the spine of one afflicted with bodily infirmities, or who advertised to treat, for pay, by chiropractic spinal adjustment, persons thus afflicted. The court said: "Webster's New International Dictionary defines 'chiropractic' as: 'A system of healing that treats disease by manipulation of the spinal column.' Counsel for appellee advises us that: 'The chiropractor claims that all the diseases which are in any way affected by his adjustments are caused by the partial displacement of the vertebræ, thus causing the nerves which pass through the openings in the vertebræ to press against the sides of the openings and prevent the life fluid from flowing freely through the nerve to the part of the human system to which the particular nerve reaches. Diseases not caused by the pressing of the nerves against the sides of these openings the chiropractor does not in any way treat. The chiropractor claims that the only treatment so called which he uses is not a treatment, but merely an adjustment of the vertebræ, which restores the vertebræ and the nerves to their normal position and thus removes the cause of the disease. He does not practice surgery or medicine and does not use any other manipulations whatever than the adjustment of the vertebræ.' But the language of the 1908 amendment is very broad, and even under the foregoing description of chiropractic it may well be said that one whose vertebræ are partially displaced, causing impairment of nerve function, is one afflicted with bodily infirmity, and that one who restores the functional activity of the nerve on which the maladjusted vertebræ had formerly pressed is treating, or attempting to treat, such afflicted person. It may be argued that, giving the entire language a close, critical, and discriminating meaning and construction, this method of so-called 'treatment' is in no sense the product of medicine or surgery, and would, indeed, come more nearly under the term 'osteopathy.' But the manifest object and intent of the legislature was to protect the public from ignorance and imposition in the healing art. Osteopathy is carved out as a separate department, and registration and license are required, while its practitioners are prohibited from giving medicine and performing surgical operations; that is, from practicing medicine and surgery as distinguished from osteopathy. But 'medicine and surgery,' which the appellee is charged with attempting to practice, by common use and adjudged meaning cover a wide portion of the domain of healing, and may and should be held to cover the case of one who, not claiming to be a physician or surgeon, really practices osteopathy under another guise without possessing the qualifications required of the osteopath."

DAMAGES RECOVERABLE BY PASSENGER FOR INSULTING LANGUAGE USED BY CONDUCTOR. — In Bleecker *v.* Colorado, etc., R. Co., (Colo.) 114 Pac. Rep. 481, it was held that the use by a conductor to a passenger lawfully upon a train, and conducting himself with propriety, of language calculated to humiliate, mortify, or disgrace the passenger, gave the passenger a right of action against the railroad company for compensatory damages for the mental pain thus occasioned. The court said: "Counsel for defendant contend that 'mental suffering alone, unaccompanied by physical injury or any other element of recoverable damages, cannot be made the subject of an independent action for damages.' There are authorities cited by counsel for defendant which support their contention; but we shall not undertake to analyze them, or point out wherein they may be or are distinguishable from the case at bar. . . . For a breach of the contract of carriage as the result of a conductor assaulting a passenger without provocation, the authorities are practically unanimous in holding that for insulting language, used in connection with the assault, damages for mental suffering caused thereby may be recovered. If damages are recoverable for a breach of the contract in one instance, there is no good reason why a breach of such contract as the result of using insulting language should not give a right of action, independent of other acts, which may constitute a breach. Wounding a man's feelings by the use of opprobrious language in circumstances constituting a breach of the contract of carriage is as much actual damages as assaulting him. The difference is that by the breach in one instance mental suffering only is caused, while in the other it is physical; but this is the result of the difference in the means employed in committing an injury, which constitutes a breach of the contract between the carrier and the passenger. To deny the passenger a remedy where, without justification, the conductor assails him with abusive and insulting language, would, in effect, abrogate an important element of the contract of carriage, render it a nullity, and permit the carrier to violate it with impunity. That a new field of litigation may be opened, where the damages claimed will be difficult of ascertainment, is not a reason why the carrier should be relieved from fulfilling its contract for decorous and respectful treatment of its passengers."

PRESENTMENT OF NOTE BY TELEPHONE AS BINDING INDORSER. — In Gilpin *v.* Savage, (N. Y.) 94 N. E. Rep. 656, which was an action against the indorser of a promissory note made payable at a particular place, designated by street and number, which was the residence of the maker, the only question was whether the presentment to the maker was sufficient to charge the indorser. At the maturity of the note it was in the hands of the Columbia National Bank, which was located about two miles from the maker's residence in Buffalo. After some delays the cashier of the bank succeeded in calling up the maker at his place of residence by telephone. He stated to him that the bank held the note, and the further conversation between the parties was assumed by the court to be sufficient to establish a demand for its payment and refusal or statement of inability on the part of the maker to comply with the demand. The cashier had the note in his possession where the demand was made, and the maker made no request to see it or for its production, but stated he would call at the bank, which he did in a short time subsequently. What there transpired did not appear. On these facts it was held, reversing a judgment below, that there had been no proper presentment of the note to bind the indorser. The court said: "By section 116 of the Negotiable Instruments Law an indorser engages that on due presentment a note or bill will be paid, and that if it be dishonored, and if the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder; by section 130 presentment for payment is necessary in order to charge the

indorser; by section 132 presentment, to be sufficient, must be made at a proper place as defined in the act; and by section 133 presentment is made at a proper place where a place of payment is specified in the instrument and it is there presented. These statutory provisions seem to be a mere re-enactment of the common law as it has hitherto obtained in this State, with the possible exception that they may have altered the rule that, where no possible damage could occur to the indorser by the failure to make proper presentment, he was not discharged by such failure, which exception, however, was of the most limited character; mere insolvency of a party primarily liable on the instrument not being sufficient to create it. . . . The counsel for the respondent seeks to sustain the judgment below on two propositions: First, that a demand over the telephone on the maker, at the place specified in the note, is the same as a demand at that place by ordinary speech; second, that the possession of the note by the cashier was sufficient to make the demand a proper one. The truth of the first proposition as a general rule may be conceded; but the argument ignores the fact that a valid presentment consists of something more than mere demand. It requires personal attendance at the place of demand with the note, in readiness to exhibit it if required, and to receive payment and surrender it if the debtor is willing to pay. The counsel cites several cases in which it is said that the possession of the instrument by the person making the demand is sufficient, although it is not actually exhibited. These statements were entirely accurate when made, before the general use of the telephone. When demand is made by ordinary human vocal power, unaided by mechanical device, it is plain that the person making the demand is necessarily present at the place at which the demand is made, and if the instrument is in his possession the presence of the instrument is equally clear. The statement, if now inaccurate, is so by the use of the telephone. If the theory on which the decisions of the courts below have proceeded is to prevail, it is difficult to see why a valid presentment of a note payable in Buffalo might not be made over the telephone from New York; or, if that is to be deemed too great a distance, where shall the line between a sufficient and insufficient demand and presentment be drawn? Will a demand for payment of an instrument payable in Buffalo be good if made at Batavia, and bad if made at Rochester? The judgment appealed from should be reversed, and new trial ordered."

EXCLUSION OF YOUNG WOMEN FROM CHINESE RESTAURANTS. — In *In re* Opinion of the Justices, (Mass.) 94 N. E. Rep. 558, the Massachusetts House of Representatives presented to the Supreme Judicial Court of that State the following question: "If the legislature is of the opinion that public order, decency, and morality require that girls and young women be excluded from Chinese restaurants and hotels, is it within the constitutional power of the legislature to enact a law making it a criminal offense for any woman under the age of twenty-one years to enter a hotel or restaurant conducted by Chinese, or to be served with food or drink therein, or for the proprietor of any such hotel or restaurant to admit thereto a woman under the age of twenty-one years, or to serve her with food or drink therein?" The court decided the question in the negative, holding that such a law, if enacted, would violate the Fourteenth Article of the Amendments to the Constitution of the United States, which provides as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The court said: "The business of keeping a hotel or restaurant, to which the proposed legislation relates, is a necessary and proper kind of business that is entitled to the protection of the laws. It may be conducted legally or illegally, by a person of any nationality. The proposed law, without reference to the way in which it is conducted, puts a restraint upon it which might be expected very seriously to interfere with the successful management of it whenever it is carried on by a person of a particular nationality, which is not put upon it when it is carried on by a person of any other race and nationality. By the strict terms of the proposed law it would be a criminal offense for a Chinese proprietor of a hotel or restaurant to permit his wife, if she was under the age of twenty-one years, or his grown-up daughter of less than that age, to enter his hotel or restaurant, or to be served with food or drink therein. This is a very great interference with the liberty of the subjects of a foreign ruler lawfully residing within the jurisdiction of this State. It is a harmful discrimination against persons of the proscribed class, founded wholly upon their race and nationality, and it plainly falls within the constitutional prohibition quoted above. It subjects Chinese to an oppressive burden that deprives them of liberty which all others enjoy, and interferes with their right to carry on business, acquire property, and earn a livelihood, and denies them the protection of equal laws. The only question that can be regarded as doubtful by anybody is that which arises on the supposition that the legislature may be 'of the opinion that public order, decency, and morality require that girls and young women be excluded from Chinese restaurants and hotels.' This brings us to the consideration of the police power. There is no doubt of the right and duty of the legislature to enact laws for the promotion of public order, decency, and morality. But when such legislation interferes with the exercise of personal rights, it must be directed to the prevention of real evils in the interest of morality. This proposed legislation does not assume to forbid anything that is necessarily evil in itself, or to deal directly with any offense against order, decency, or morality. There are good hotels and bad hotels, good restaurants and bad restaurants, kept by men of the Caucasian race, and there are others of both kinds kept by men of other races. This legislation does not refer to the character or condition of the hotel or restaurant that a young woman may not enter, but refers only to the nationality of the person who conducts it. The enactment of such legislation is not a proper exercise of the police power. It has no direct relation to the evil to be remedied. It forbids the entry of a young woman into the hotel or restaurant of a Chinese proprietor, even if it is a model of orderly and moral management, and it permits the entry of young women into a hotel or restaurant kept by an American, when it is known to be maintained in part for the promotion of immoral or criminal practices. The classification of hotels and restaurants into those that are open to young women and those that are closed to young women is not founded upon a difference that has any just or proper relation to the professed purpose of the classification. The only classification is into hotels and restaurants kept by Chinese and those kept by persons of any other nationality."

New Books.

INTRODUCTION TO THE SCIENCE OF LAW.

By Karl Gareis, Professor of Law at Munich. Pp. xxix + 374. Boston: Boston Book Co., 1911.

Professor Gareis's treatise is the second treatise in the Jurisprudence and Philosophy of Law series published by the Boston Book Company, the first being Korkunov's Theory of Law, which has already been noticed in these columns. Professor Gareis brought out the first edition of this work in 1887, and it is the third edition, brought out in 1905, which has recently been translated by Albert Kocourek, lecturer on juris-

prudence in Northwestern University. Much of the treatise is taken up with a discussion of what law is, its various sources, and its relation with morals, religion, equity, and social convention. But the greater part is concerned with a consideration of the underlying principles of the system of civil law viewed from a German standpoint and based on the German law. There is an introduction to the work by Roscoe Pound, Story Professor of Law in Harvard University, which contains a brief consideration of the various schools of jurists, philosophical, historical, and analytical, and wherein Professor Pound says that Professor Gareis's book "is a book to think through, not merely to read through." The publication of this and like books written by scholars of other countries where the common law does not prevail, and the greater attention now paid in our universities to comparative law and the science of the law, cannot but help in the development of the common law as a science, and the broadening effect of these excursions into foreign fields will be felt in future legislation. The publication and reading of such books should therefore be encouraged.

THE COMMERCIAL CODE OF JAPAN.

By Yang Yin Hang of the University of Pennsylvania. Pp. xxiii + 319. Boston: Boston Book Co., 1911.

The volume before us is one of the University of Pennsylvania Law School Series, a series the object of which is to promote the scentific study of legal problems, historical and practical, and to assist in the improvement of the law. The author is a native of China, and was for two years a graduate student in law at the University of Pennsylvania. It was while he was in residence at the university that he translated the commercial code of Japan, which fills most of the volume at hand. There is, however, a historical introduction designed to give in outline not only the history of the Japanese commercial code, but a concise statement of the history and sources of the present commercial law of Continental Europe. Moreover, with the same object in view, Mr. Hang has placed in notes running throughout the volume information in regard to analogous provisions in European codes. Finally, as said in the preface, written by Dean William Draper Lewis, "as the Japanese code itself is avowedly based mainly on the German commercial code, where differences exist which may interest the student of comparative law, the exact provisions of the German code are given in full in the notes." The code as it appears in the translation is divided into five books, and these books deal with commerce in general; business associations; commercial transactions such as sale, brokerage, carriage of goods and passengers, and insurance; negotiable paper; marine commerce. The translation is smooth, and the words used to express the various shades of meaning seem to have been well chosen.

QUESTIONED DOCUMENTS.

Questioned Documents. By Albert S. Osborn, examiner of questioned documents. Pp. xxiv + 501. Rochester, N. Y.: The Lawyers' Co-operative Publishing Co., 1910.

This is a book manifestly representing an immense amount of careful thought and labor, written by a distinguished handwriting expert, who is also a capable chemist and a past master in the art of photography. The author's testimony in important cases all over the country — for instance, on behalf of the State in the Allds case in the New York legislature — has been received on the same basis as that of any other scientist; and we do not hesitate to say that no lawyer engaged in a litigation involving a "questioned document" can afford to overlook this extraordinary work. Furthermore, as Professor John H. Wigmore says in his introduction to the work: "The book abounds in the fascination of solved mysteries and celebrated cases."

Judicial comments derogatory of expert opinion evidence in handwriting can easily be matched with like estimates, taken from judicial opinions, of the value of testimony by nonexperts based on supposed knowledge of a person's handwriting. Far more than this can be done. "Of all evidence the narration of a witness of his conversation with a dead person is esteemed in justice the weakest," said Mr. Justice Manning in *Piffet's Succession,* 37 La. Ann. 871, 873. "Courts lend a very unwilling ear to statements of what dead men had said," declared Mr. Justice Catron in *Lea* v. *Polk County Copper Co.,* 21 How. (U. S.) 493, 504, frequently quoted by other courts. And the same distrust attaches to testimony to admissions of living persons. But everywhere and every day contracts are being satisfactorily proved both against living defendants and against the representatives of decedents. Of course; for the death of one who has made an oral statement cannot affect the memory of those with whom he talked, nor does it necessarily convert them into perjurers. In the recent inquisition in lunacy against Robin, in New York, both the court and the jury spurned the concurrent and uncontradicted testimony of thirteen eminent alienists. Is there any record against handwriting experts comparable to that? But the time is far distant when the testimony of acknowledged experts in mental disease will be subjected to general and indiscriminate condemnation. The truth is that the value of *all* opinion evidence depends almost entirely upon the persuasiveness of the reasons adduced in support of the opinion.

Now, Mr. Osborn's treatise contains upward of two hundred illustrations — one of them, by the way, printed in half a dozen colors — and the making and reproduction of them in a book must have cost a great deal of money. They add greatly to the attractions of a work already exceptionally fascinating, by enabling a reader to judge for himself how much justification there is for the author's testimony, so to speak, in exposition of the illustrations, which exhibit not only handwriting characteristics but enter every other domain of Mr. Osborn's profession and art.

The book is by no means confined to a discussion of handwriting individualities. Observe, for example, the highly instructive and magnificently illustrated chapters XVIII. (33 pages) and XXV. (30 pages). Here are the titles of the twenty-six chapters:

I. Care of Questioned Documents. II. Classes of Questioned Documents. III. Standards of Comparison. IV. Photography and Questioned Documents. V. The Microscope and Questioned Documents. VI. Instruments and Appliances. VII. Movements, Line Quality, and Alignment in Writing. VIII. Pen Position, Pen Pressure, and Shading. IX. Arrangement, Size, Proportions, Spacing, and Slant in Writing. X. Writing Instruments. XI. Systems of Writing and Questioned Documents. XII. Variation in Genuine Writing. XIII. Individual and General Characteristics in Writing. XIV. Variety of Forms in Handwriting and Mathematical Calculations Applied to Questioned Handwriting. XV. Simulated and Copied Forgeries. XVI. Traced Forgeries. XVII. Anonymous and Disputed Letters. XVIII. Ink and Questioned Documents. XIX. Paper and Questioned Documents. XX. Sequence of Writing as Shown by Crossed Strokes. XXI. Writing over Folds in Paper. XXII. Erasures and Alterations in Documents. XXIII. Questioned Additions and Interlineations. XXIV. Age of Documents. XXV. Questioned Typewriting. XXVI. Questioned Document Case in Court.

Many legal decisions are cited in the notes. The index follows the style used now and for a long time past in works of pure scholarship. And the publishers have done their part with characteristic neatness and general good taste.

C. C. M.

BENJAMIN ROBBINS CURTIS.

From "Reminiscences of the Geneva Tribunal," by Frank Warren Hackett.

WITHOUT question, Curtis held the rank of the foremost lawyer in America. He stood far in advance of those who approached him, in the consummate ease with which he could state a case in plain and direct terms. His words were few — for rarely did he address the court for more than half an hour. He would open to the jury, for example, a patent cause of an intricate character, in brief sentences, so simply and so clearly stated that every man on the panel saw through it all. With an unerring instinct this wonderful advocate discerned the true turning-point of every controversy in which he was of counsel. The unrivaled acuteness he displayed in seizing upon that which was vitally important was excelled only by that extraordinary talent which enabled him to convey to the mind of another a perfectly clear view of everything of controlling moment that the issue involved.

When you listened to an argument by Mr. Curtis you thought that his client's case was one of the simplest that ever a court had to deal with; you saw plainly just what it was that ought to be decided — and then you concluded that for this time, at any rate, Mr. Curtis had been retained on the right side. The gift was his to a degree so remarkable that Mr. Curtis always held the listener to the closest attention; and that, too, by no grace or trick of oratory, but by force of the logical sequence of his quietly delivered argument that had a wonderful intellectual fascination about it.

News of the Profession.

AT THE ANNUAL MEETING OF THE LOUISIANA STATE BAR ASSOCIATION at Lake Charles on June 3 and 4, one of the features will be an address by Congressman Martin W. Littleton, of New York.

CANADIAN JUDGE DEAD. — Ex-Judge Louis Belanger, formerly judge of the Quebec Superior Court, died at Ottawa on May 5, aged 85 years. Judge Belanger retired from the bench in 1902.

CHICAGO LAWYER TO BE FIRST ASSISTANT SECRETARY OF INTERIOR. — Samuel Adams, a Chicago lawyer, will succeed Frank Pierce, resigned, as first assistant secretary of the interior department.

NEW PENNSYLVANIA JUDGE. — Governor Tener, of Pennsylvania, has appointed Paul E. Benson, of Harrisburg, additional judge for Erie county, a position recently created by the legislature.

THE AMERICAN BAR ASSOCIATION has sent out notices of the annual meeting of the association, to be held in Chicago, August 29–31. The principal address will be made by William B. Hornblower, of New York.

DEATH OF ONTARIO LAWYER. — Robert Vashon Rogers, K. C., LL. D., died at Kingston, Ont., on May 2. Dr. Rogers was well and favorably known in the Province of Ontario and stood high at the Canadian bar.

THE IOWA STATE BAR ASSOCIATION will hold its annual meeting in Oskaloosa on June 29 and 30. Major John F. Lacey, of Oskaloosa, will deliver the address of welcome, and the principal speaker will be Governor John Burke, of North Dakota.

WEST VIRGINIA JUDGE NAMED. — Warren Kittle, of Philippi, has been appointed by Governor Glasscock judge of the new Nineteenth Circuit in West Virginia, composed of the counties of Barbour and Randolph. Mr. Kittle was formerly prosecuting attorney of Barbour county.

YOUNG LAWYER APPOINTED TO MISSOURI CIRCUIT BENCH. — B. H. Dyer, a young lawyer of St. Charles, Mo., has been appointed by Governor Hadley circuit judge of the judicial district in Missouri, composed of Pike, Lincoln, and St. Charles counties, recently created by the legislature.

NOTED IOWA LAWYER DEAD. — General Andrew Jackson Baker died at Centerville, Ia., on April 23, at the age of 79 years. For years General Baker was a central figure in the political life, not only of Iowa, but also of Missouri, having had the distinction of serving terms as attorney-general of both States.

CANADIAN APPOINTMENTS. — Sir Francis Langleier, chief justice of the Supreme Court of Quebec, has been appointed lieutenant-governor of that province to succeed the late Sir A. P. Pelletier. Premier Hazzard, of Prince Edward Island, has been appointed to the vacancy on the Supreme Court bench of the island.

EMINENT JURIST DEAD AT OTTAWA. — Sir Henry Elzear Taschereau, former chief justice of the Supreme Court of Canada, died at Ottawa, on April 14, at the age of 75. He was appointed to the Supreme Court bench in 1879, became chief justice in 1902, and retired in 1906. He became a member of the Imperial Council in 1904, and was the author of several important legal works.

NORTH CAROLINA STATE BAR ASSOCIATION. — The annual session of the North Carolina State Bar Association will be held at Lake Toxaway, June 28 to 30. The address of welcome will be delivered by W. E. Moore, of Webster, and the response by Judge D. L. Ward, of New Bern. One of the principal addresses will be by Martin W. Littleton, member of Congress from New York. C. W. Tillett, of Charlotte, is president of the association.

THE GENTLER SEX. — Mrs. Antoinette D. Leach has been chosen president of the Bar Association of Sullivan county, Indiana. She is the only woman lawyer in the county. Up in a little mining camp (8,860 feet up) on the western slope of the Rockies, just over the crest of the Continental Divide, is the one woman county judge in the United States, Mrs. Lydia Berkley Tague, of the County Court of Eagle county, Colorado.

MICHIGAN STATE BAR ASSOCIATION. — The twenty-first annual meeting of the Michigan State Bar Association will be held at Battle Creek on July 6 and 7. Attorney-General George W. Wickersham will be the principal speaker. Others who will deliver addresses are Judge Arthur C. Denison, of the United States District Court at Grand Rapids; Professor Jerome C. Knowlton, of the University of Michigan; Thomas E. A. Weadock, of Detroit; A. B. Eldridge, of Marquette, vice-president of the State Bar Association; and Grant Fellows, of Hudson.

DEATH OF SECRETARY OF INTERSTATE COMMERCE COMMISSION. — Edward A. Moseley, secretary of the Interstate Commerce Commission, died at his residence in Washington, D. C., on April 17. Secretary Moseley was born in Newburyport, Mass., in 1846. He practised law in Massachusetts, served as a member of the State legislature, and held a number of appointive offices in the State. Upon the creation of the Interstate Commerce Commission in 1887, he was appointed secretary of that body, and held the office continuously until his death.

MINNESOTA JUDICIAL APPOINTMENTS. — Governor Eberhart, of Minnesota, has made the following judicial appointments: Judge E. F. Waite, of the Minneapolis Municipal Court, to be district judge for Hennepin county, under the new law creating a seventh judge for the district to look after the juvenile court work; Edmund A. Montgomery, a Minneapolis attorney, to succeed Judge Waite on the Municipal Court bench; and

Herbert A. Dancer, of Duluth, to be district judge of the Eleventh Judicial District. Judge Dancer is but 36 years old.

DEATH OF JUSTICE SPENCER, OF NEW YORK. — Supreme Court Justice Edgar A. Spencer died at his home in Gloversville, N. Y., on May 5. Justice Spencer was one of the best known judges and lawyers in Northern New York. He was born in Cherry Valley, N. Y., Nov. 23, 1847, was admitted to the bar in 1875, and was engaged in the general practice of law until 1901. He was city clerk and later city attorney of Gloversville, and in November, 1894, was elected as a Republican to the constitutional convention of the State of New York. He was elected in November, 1911, for a full term of fourteen years as justice of the Supreme Court of New York, and served as such until the time of his death.

NEW JERSEY JUDICIAL APPOINTMENTS. — Governor Wilson, of New Jersey, has made the following appointments to the bench: Samuel Kalisch, to be justice of the Supreme Court, succeeding Justice Reed; Walter C. Cabell, of Midvale, to be District Court judge in Passaic county; Peter Stillwell, of Bayonne, to be District Court judge in that city; Abram Klenert, to be District Court judge in Paterson; and ex-Judge Allan B. Endicott, of Atlantic City, to be justice of the Court of Errors and Appeals, to succeed the late Justice George R. Gray.

FEDERAL JUDGE FOUND DEAD. — John R. Rogers, federal judge of the Western District of Arkansas, was found dead in his bed at a hotel in Little Rock, Ark., on April 17. Judge Rogers was 64 years of age and had a notable public career. He came to Arkansas in 1869 from North Carolina, locating at Fort Smith. In 1877 he was elected to the state circuit bench and served until 1882, and the next year he went to Congress as representative from the fourth Arkansas district, where he remained until 1891. In 1892 he was a delegate to the National Democratic convention, and in 1896 he was appointed United States judge of the Western District of Arkansas by President Cleveland, to succeed Judge Isaac C. Parker.

UTAH STATE BAR ASSOCIATION. — The thirteenth annual convention of the Utah State Bar Association was held in Salt Lake City on April 8. Judge Charles Baldwin, the retiring president of the association, delivered the opening address. Other speakers were M. E. Wilson, who discussed "Utah's Ninth Legislature," and Judge J. N. Whitecotton, of Provo, who spoke on "Evaporating a Constitution." The election of officers resulted as follows: E. B. Critchlow, president; Judge N. J. Harris, of Ogden, and each of the judges of the other districts, vice-presidents; Stephen L. Richards, secretary; L. B. Swaner, treasurer; H. R. McMillan, C. R. Hollingsworth, C. S. Varian, Waldemar Van Cott, and Judge J. W. N. Whitecotton, executive council; W. A. Lee, W. D. Riter, and E. A. Walton, committee on grievances.

MARYLAND STATE BAR ASSOCIATION. — The annual meeting of the Maryland State Bar Association will be held at Cape May, N. J., from June 29 to July 1. Leaders of the Maryland and New Jersey bar will make addresses at the meeting, as will also prominent jurists from various sections of the country. One of the justices from the United States Supreme Court will probably address one of the sessions. The committee on nominations has named the following officers for the ensuing year: President, James Alfred Pearce, of Chestertown; vice-presidents, E. Stanley Toadvin, of Salisbury; J. Frank Harper, of Centerville; Thomas H. Robinson, of Belair; A. Hunter Boyd, of Cumberland; John Wirt Randall, of Annapolis; Milton G. Urner, of Frederick; Walter J. Mitchell, of La Plata; Bernard Carter, of Baltimore; John Hinkley, of Baltimore; secretary, James W. Chapman, Jr., of Baltimore; treasurer, R. Bennett Darnall, of Baltimore; executive council, Benjamin A. Richmond, of Cumberland; George Weems Williams, of Baltimore; J. Harry Covington, of Easton, and Moses R. Walter, of Baltimore.

MISSISSIPPI STATE BAR ASSOCIATION. — The State Bar Association of Mississippi convened at Hattiesburg on May 2 for a three days' session, President W. H. Powell, of Canton, presiding. The address of welcome was given by Judge N. C. Hill of the Hattiesburg bar, and the annual oration was delivered by Hon. James Weatherby, of Birmingham, Ala. S. E. Travis read a paper on "Uniform Legislation by States." The election of officers resulted as follows: President, A. F. Fox; vice-presidents, Judge N. C. Hill, of Hattiesburg; Sam C. Cook, R. F. Reed; secretary and treasurer, Judge Sidney Smith, of Jackson; board of directors, A. T. Stovall, chairman; first district, A. J. Rose, of Greenville; Robert H. Powell, of Canton; J. B. Boothe, of Lexington; J. A. Teat, of Kosciusko; P. D. Ratliff, of Raymond; second district, E. J. Bowers, of Bay St. Louis; Stone Deavors, D. A. McIntosh, S. E. Travis, of Hattiesburg; Hanan Gardner; third district, H. H. Creekmore, A. T. Stovell, J. W. Cutrer, J. T. Dunn, Stacy Hibbler. The convention closed with a banquet on the evening of May 4. The court stenographers of the State also held a convention at the same time and place.

LIEUTENANT-GOVERNOR OF QUEBEC DEAD. — Sir Alphonse P. Pelletier, lieutenant-governor of Quebec, died at his residence in Spencerwood on April 29. Sir Alphonse was born in Rivier Ouelle, Jan. 22, 1837. Soon after his admission to the bar he drifted into politics. At one time he was simultaneously a member of the Dominion Parliament and a member of the provincial legislature. He retired from the lesser body in 1874, following the passage of the act against dual representation. In 1877 he became a member of the Dominion cabinet, holding the portfolio of minister of agriculture in Sir Alexander Mackenzie's administration. He was president of the Canadian commission at the Universal Exposition in Paris in 1878, and for his services there was decorated by the late Queen Victoria a C. M. G. On the return of the Liberals to power in 1896, Sir Alphonse was appointed speaker of the Senate, which position he held until his appointment to the bench. Sir Alphonse also had military experience, having commanded a battalion during the Fenian raid of 1866.

English Notes.

THE HOUSE OF LORDS AS A JUDICIAL BODY. — The refusal of Mr. Asquith recently, in reply to a question suggesting the alteration, to entertain a proposal of designating the House of Lords in its judicial capacity by some other title is justified by the fact that, while the Appellate Jurisdiction Act 1876 places the jurisdiction of the House of Lords on a statutory basis and determines the constitution of the court, in so far as it provides that no appeal shall be heard unless there are at least three members present who have judicial experience of the kind described in the Act, still it is equally true that a sitting of this court is a sitting of the House of Lords, that the forms of giving judgment follow the forms of carrying a motion on any other subject, and that there is nothing but the conventions of the House of Lords itself to prevent any peer of Parliament from taking part in the proceedings of the House of Lords when sitting as a court of appellate jurisdiction. See Anson's Law and Custom of the Constitution, I., Parliament, p. 227; see also p. 368.

THE KING'S PARDON FOR A MOTORIST. — A situation of a somewhat unique character has arisen by the King being graciously

minded to extend a royal pardon to a convicted motorist. It seems that Mr. Sheriff-Substitute Blair fined Mr. Dunn for having caused an accident, which was really caused by the negligence of the driver of a horse-drawn vehicle, and the judges of the Court of Appeal used language of a striking character as to the injustice in the court below, but were powerless to alter the decision. His Majesty, addressing his "trusty and well-beloved" sheriff-substitute, grants Mr. Dunn his "free pardon in respect of the said conviction, thereby pardoning, remitting, and releasing unto him all pains, penalties, and punishments whatsoever that from the said conviction may ensue." The Dumbarton sheriff's court decisions in these cases have been notorious for long enough, but the above incident may lead to a better state of things.

THACKERAY THE LAWYER. — In connection with the dinner in the Middle Temple on the 26th May in celebration of Thackeray's call to the bar on the 26th May, 1848, it may be noted, says the *Westminster Gazette*, that so far back as 1831 Thackeray became a student of the Middle Temple and commenced his legal studies. In less than a year, however, he gave up all idea of a legal career, and gravitated towards literature. Soon after the publication of "Vanity Fair," Mr. Monckton Milnes, father of Lord Crewe, thought of a London police magistracy as a fitting office for Thackeray. With a view to this appointment he returned to the Temple, and was called to the bar many years after he had first entered the Middle Temple as a student. Thackeray took chambers at 10 Crown Office Row, which he occupied till 1851. For the following two years he had no address in the Temple. In 1853 he migrated to 2 Brick Court, which address appears in the Law Lists till 1857, and till 1863 his name still appeared in these lists. Thackeray never, like Fielding, became a police magistrate — owing to his lack of the necessary qualification of a certain number of years' standing at the bar.

MOVING PICTURES IN COURT. — Strange productions are to be seen occasionally in our courts, civil and criminal, says the *Law Times*, but we do not remember that the cinematograph has yet been impressed in any cause in the United Kingdom, but in France "living pictures" have been seen in court. Last week when some fifteen persons appeared before the *tribunal correctionnel* at Rheims, in connection with the champagne riots, the court, we read in the *Débats*, pursued its inquiry *avec activité*. All the accused were convicted, most of them hailing from Ay, and were sentenced to terms of imprisonment varying from one month to ten months. In the afternoon the court ordered the production of the cinematograph pictures which were taken at the time of the riots. The result was that the accused were very easily identified and several summonses (*mandats d'amener*) were issued. Many of the suspects who are under arrest in the prison at Rheims, and who protested their innocence with fervor, have thus been presented to the court *en flagrant délit "rétrospectif" de rébellion*. The court has established in the same way the participation of two persons wanted, who in a motor car went about Ay and Demery during the preceding day and distributed to the *vignerons* capsules containing explosives with which the fires were caused.

INSURANCE AGAINST ACCIDENTS TO SERVANTS. — It was at one time believed that the insurance against accidents to domestic servants would be a matter involving great profit to the companies, and, correlatively, not one to which the ordinary householder need pay much attention. Some early decisions soon showed that the employer stood to lose a heavy sum even though he were in that more fortunate class who could afford to keep his premises and appliances in repair, and thus to obviate risks confessedly serious to those not so fortunately situated. The figures coming to hand each year from the companies suggest that the risks as a whole are so great that the companies are not making a profit out of this department of insurance. One company has experienced 14,000 domestic servants' compensation accidents, and the fatalities were seventy-six. It is further clear that the awards in workmen's compensation cases are based on a generous and even a lavish scale, and the average cost of an accident is tending to grow. In a word, no one can afford to omit to insure, and the companies, if they are to give in practice the security desired by insurers, will be driven to protect their financial stability by a further growth in premiums. This must have its inevitable result in accentuating the difficulty experienced by men in finding employment unless enjoying every possible physical advantage. It seems unfortunate that the legislature cannot evolve some scheme which would enable those not thus situated to be able to offer their services on terms as regards compensation likely to give them a better chance in the competition of modern times.

ENGLISH AND FRENCH PRISONS. — A writer in the *Gaulois* propounds the question, Where is it that one would desire to dwell? And he scornfully answers, Where, but in prison, indeed! In the French prisons we are told the inmates not only eat well, but they are enabled to drink while they eat. The writer then makes extracts from recent returns of jail commissariat. He passes over without comment the 975,000 kilos of flour (a kilogram being two and one-fifth pounds), 14,000 kilos of various kinds of meats, 225 kilos of potatoes, 60,000 kilos of haricot beans, but then he proceeds: "What think you of 84,000 tablets of chocolate, 16,000 red herrings, 100,000 sardines, 17,000 kilos of butter, 3,000 kilos of coffee, 85,000 new-laid eggs, 50,000 kilos of bologna sausages, 2,000 cheeses of various kinds, 200 kilos of caramels, and 2,000 kilos of other sweetmeats?" The writer thinks that a prisoner when his time expires will naturally want to stay on if it were only for the caramels and other sweetmeats. "Yes," he says, "we do all we can to make the prisoner's sojourn agreeable and to attract him back. In England, on the other hand, *le chat á neuf queues* and the hard labor have a salutary terror. The (English) jailers do not often see their clients return. But with a *bonhomme* who passes his time in the shade, gorged with tablets of chocolate, with sardines, cheeses of various kinds, things are different. If perchance he has a desire to return for good, he will exert himself very little to provide for himself. The taste for new-laid eggs and bologna sausage will be too strong for him, and he will steal a loaf, knowing well that he will be enabled to eat it with butter."

MEETING OF SOCIETY FOR ABOLITION OF CAPITAL PUNISHMENT. — At the annual meeting of the Society for the Abolition of Capital Punishment, which was held at Caxton Hall, Westminster, on April 26, Dr. Josiah Oldfield, M. A., D. C. L., presiding, the annual report was adopted. The report stated that the work of the society was not merely negative in its policy, but eminently constructive, aiming at the substitution of methods of reclamation in place of the present system of punishment, and a complete recasting of the whole penal code based on this newer conception of the aims and purposes of criminal law. In this connection such reforms as children's courts, the probation act, and the Borstal system claimed the entire sympathy of the society. Penal reform, which included the abolition of the death penalty, was but part of the larger social reform which tended in various ways to bring about the humanization of the whole of the social life of the modern civilized community. The society concentrated upon certain penal reforms, while always keeping in mind the larger ideals of which these reforms were but a part. On the motion of Mr. George Greenwood, M. P., a resolution was adopted in favor of grading "the

various crimes now wrongly classed under the head of 'murder.'" Resolutions were also carried to the effect that capital punishment should be at once abolished for the crime of infanticide, and that the government should be asked to receive a deputation on the subject; and expressing the opinion of the meeting that, capital punishment being irrevocable and in its essence revengeful, it was contrary to the right spirit in which criminals should be treated, and that it should, therefore, be abolished and replaced by curative methods of dealing with murderers.

THE LORDS OF APPEAL. — Mr. Haldane, whose elevation to the peerage may be regarded as his gnal farewell to the bar, adds yet another to the very large list of eminent men of whom political life has deprived the profession of the bar and eventually the judicial bench, on which their talents and learning would have shed lustre. It is no doubt true that Mr. Haldane might become a Lord of Appeal, and as such a member of the House of Lords in its capacity as a court of appellate jurisdiction. Lords of Appeal are defined by the Appellate Jurisdiction Act 1876, § 5, to be the Lord Chancellor of Great Britain, the Lords of Appeal in ordinary, and such peers of Parliament as are for the time being holding or have held any of the offices described in that act as high judicial offices; while the term "high judicial office," as defined by section 25, means the office of Lord Chancellor of Great Britain or Ireland, or of paid judge of the Judicial Committee of the Privy Council, or of judge of one of the Superior Courts of Great Britain and Ireland. This term, moreover, under the provisions of 50 & 51 Vict., c. 70, § 5, includes the office of a Lord Justice of Appeal and the office of a member of the Judicial Committee of the Privy Council. It is as a member of the judicial committee of the Privy Council that Lord James of Hereford, who, although he filled the office of attorney-general and had the refusal of the lord chancellorship, would not be otherwise qualified, is a Lord of Appeal. Mr. Haldame is not a member of the Judicial Committee of the Privy Council, but could, of course, without difficulty be appointed a member of that committee, as in the case of Lord James of Hereford, under the provisions of 3 & 4 Wm. IV., c. 41, § 1. His presence in the House of Lords in its appellate capacity would no doubt be a violation of the doctrine, on which too much stress can scarcely be laid, that "the judicial ought to be kept entirely distinct," in the words of Lord Broughman, "from the legislative and executive power in the state" — an objection to which the House of Lords in its judicial capacity is not merely in the case of individual members, but collectively, subject.

"MANUFACTURER" NOT A "MERCHANT." — According to the decision in Josselyn *v.* Parson, 25 L. T. Rep. 912, L. Rep. 7 Ex. 127, a manufacturer who confines himself to selling his own manufactures is not a "merchant." He does not become one through the simple circumstance that he sells the product of his manufactory. That decision was not referred to by the learned judges of the Court of Appeal in their judgments in the recent case of Lovell and Christmas Limited *v.* Wall, 104 L. T. Rep. 85. It was, however, cited by Mr. Justice Eve in the court of first instance, and his lordship was of opinion that it was an authority for holding that a person who sold an article which he had previously manufactured was not a "merchant," construing that word *prima facie* in its popular and common sense as meaning a person who dealt in an article by buying and selling it. A "merchant" differs from a "manufacturer." See Comyn's Digest, tit. Merchant. The defendant Wall had been a director of a limited company formed for carrying on the general business of provision merchants, part of the profits whereof was derived from the manufacture and sale of margarine by two subsidiary companies. On the amalgamation of that company with the plaintiff company, who were carrying on the business of provision merchants, the defendant entered into an agreement to become a director of the plaintiff company for a period of five years, and that he would not at any time, solely or jointly, directly or indirectly, carry on or be engaged or concerned or interested in the business of a "provision merchant" within a specified area, save on behalf of the plaintiff company. The defendant, having ceased to be a director of the plaintiff company, threatened to carry on the business of manufacturing margarine and selling the same. In so far as the latter word of the prohibited trade was concerned, it is seen that what the defendant proposed to do would not bring him within that word. And some importance was attached thereto by Mr. Justice Eve, taking it singly. But in the Court of Appeal the decision proceeded on the two words read in conjunction, and principally on the former of them. What the defendant was about to do was to carry on business in an article of food that unquestionably formed a part of that of a provision merchant, who is defined by the standard dictionaries as a general dealer in articles of food; namely, margarine. Had it been merely an insignificant part, that alone would not apparently have sufficed to cause a breach of the agreement, having regard to what was said by the Lords Justices in Stuart *v.* Diplock, 62 L. T. Rep. 333, 43 Ch. Div. 343. A different view, however, might possibly have been open if a business that was a substantial part of a provision merchant's business was to be carried on by the defendant, for then the doctrine which was established in Fitz *v.* Iles, 68 L. T. Rep. 108, (1893) 1 Ch. 77, would have applied, a case where Stuart *v.* Diplock (*ubi sup.*) was distinguished. Trade evidence was very properly admitted by Mr. Justice Eve to show that there was a secondary meaning attached to the word "provision," and what classes of goods were included therein, when used in connection with the word "merchant;" and that margarine came within those classes, although many articles which in the primary sense of the word would be included were excluded. But there was nothing of a convincing nature to show that the business of manufacturing margarine and selling the manufactured article, and doing nothing else, was known in the trade as carrying on the business of a "provision merchant." Consequently, the decision arrived at by the Court of Appeal was that the plaintiff company, in seeking to restrain the defendant from doing that which he threatened to do, had failed to prove that he would be carrying on the business of a "provision merchant." As illustrative of the conclusiveness of the evidence that is required to establish that words have acquired a secondary meaning, this case is of considerable interest and importance.

Obiter Dicta.

LIVED UP TO HIS NAME. — From a case reported in 78 N. J. Law 687 it appears that one Michael Kiss committed bigamy.

STRANGE! — "There were two sides to this lawsuit." *Per* Porter, J., dissenting, in Gilbert *v.* Grubel, 82 Kan. 476.

HE STILL LIVES. — W. Shakespeare was one of the counsel for the respondent in Nicholson *v.* Piper, [1907] A. C. 215, and won his case.

IS HE MARRIED? — Judge Shafer, of Pittsburg, utters the following words of wisdom to mere men: "Never reply to the taunts of an angry woman. Flee from her, and do not begrudge her the last word, for she will have it anyway."

A STUDY IN NOMENCLATURE. — *Paul Bakewell* was one of the counsel in Layton Pure Food Co. *v.* Church & Dwight Co., (C. C. A.) 182 Fed. Rep. 35, a *trademark* suit between manu-

facturers of baking powder, and *Paul* on Trademarks was cited in Judge Sanborn's opinion.

THE BRASS AGE. — Says Mr. Justice Grantham, of England: "We have passed through the Stone Age and we have passed through the Bronze Age. I think the present age ought to be called the Age of Brass. Nowadays the courts have very little to do but to try cases arising out of people being 'cheeky' or 'brassy,' or telling lies."

DOGS AT THE RACES. — "We are not aware of any particular trait in the dog which indicates his mental capacity to derive any especial pleasure from witnessing a speed contest by horses, or that speed contests are given for the edification or pleasure of the dog family." *Per* Stewart, J., in McCalin *v.* Lewiston Interstate, etc., Assoc., 17 Idaho 63.

WITHOUT HIS CONSENT. — In a divorce suit brought in Arkansas a year or two ago, wherein George Fought was fighting his wife, Minnie Fought (who didn't fight), the plaintiff made the following allegation, to wit: "That on the 2d day of September, 1908, defendant committed adultery with John Watson without his consent or connivance, and that he has never lived or cohabited with the defendant since then."

JUDICIAL MAGNANIMITY. — "I agree that the word 'persons' would *prima facie* include women," said Lord Loreburn, L. C., in Nairn *v.* University of St. Andrews, [1909] A. C. 147, 161, a case where he had just heard Miss Macmillan and Miss Simson, appellants, "assisted by John Mair, of the Scottish bar," plead their own case before the House of Lords, and accepted the information gained by his eyesight as *prima facie* evidence.

CONGRUOUS COLOR COINCIDENCES. — In Handy *v.* State, 46 Tex. Crim. Rep. 406, it appeared that the darky defendant had forcibly entered a private residence "during the temporary absence of its occupants," and asported "two white jars of blackberries;" and "four black hens were missing from the hen roost." The jury assessed his punishment at thirty years imprisonment in the penitentiary, and the verdict was affirmed.

COMPARATIVELY WELL. — "That he was really sick, and unable to attend court on the day the cause was tried, we cannot doubt; because from the testimony of the physician, he ultimately died of the indisposition he then had. . . . As little room to doubt that on the day previous, he was comparatively well; was drunk in Louisville, during most of the day, and did not return to his residence in the country until after night," etc. *Per* Nicholas, J., in Turner *v.* Booker, Dana (Ky.) 334, 337.

WHICH IS THE SIDE ISSUE? — Lawyers usually have a hobby of some sort to which they turn with relief from the pressing cares of such legal business as they are able to get hold of. Such seems to be the case with a certain young attorney whose "ad" follows:

KEEP IT UP, JUDGE. — In Southern R. Co. *v.* Harrington, 52 So. 57, which was an action by a railway postal clerk against a railroad company to recover damages for the failure of the defendant to heat its mail car properly, Mr. Justice Mayfield said: "The court also properly declined to allow defendant to prove that plaintiff was a 'chronic kicker.' Any one might 'kick' rather than have his 'kickers' frostbitten." The learned justice is progressing into the class of the late Judge Wilkes, of Tennessee; Judge Powell, of Georgia; Judge Lamm, of Missouri; and Judge Barnes, of Wisconsin.

NEW YORK CITY LAWYERS TAKE NOTICE. — At the risk of starting a stampede from certain congested quarters, it is our duty, as a faithful chronicler of the news of the day, to announce that Stanton county, Kansas, with a population of 1,034, has not a lawyer. Only the other day a resident of an adjoining county had to be called in to act as prosecuting attorney in a murder case. No one as yet, so we are credibly informed, has been assigned to defend the prisoner, and — well, railroad guides may be secured without difficulty at any of the trunk line offices, and road maps are given away by all the prosperous automobile manufacturers.

NOT YET PAID FOR. — The following affidavit appears on the records of mortgages of an Indiana county:

Mary E. Smith, wife of John Smith, being duly sworn on oath says that the within mortgage is executed to obtain money to pay off a certain mortgage held by Benjamin Yoder and assigned to Adam Smith, which last said mortgage was given to pay a mortgage to Sarah J. Robinson, which last said mortgage was given to secure money borrowed to pay a mortgage to J. R. Ott, who held a mortgage upon said land given to secure money borrowed to pay a mortgage held by Martin O'Brien on said land, which last said mortgage was given to secure the unpaid purchase money for said land, and that the money herein secured was in place of the purchase money mortgage, and that she is not by this mortgage security for the debt of any person whosoever.

Subscribed and sworn to before me, this 15th day of February, 1888. (LS) Arthur L. Cripe, Notary Public.

The correspondent who sends us the foregoing is authority for the statement that the mortgage to which the affidavit is attached has not yet been paid.

PUTTING ONE OVER ON THE COURT. — In the olden days, when Wirt and Webster used to argue causes before the Supreme Court of the United States, it was the fashion to introduce an occasional Latin quotation. The fashion long ago disappeared. A reminder of it, however, occurred recently, at the trial of the very important case of Virginia *v.* West Virginia. Among the numerous briefs there was one, on the West Virginia side, that had been printed on tinted paper. Mr. Justice Holmes, wishing to be assured with regard to the accuracy of a statement, held up this particular brief to the view of counsel then addressing the court — Major Holmes Conrad, of Virginia, formerly Solicitor-General of the United States. Conrad blandly remarked: "Your Honor, — *'Nimium ne crede colori.'*"

THE HOLE REMAINED. — We had never suspected Chief Justice Clark of the North Carolina Supreme Court of being a humorist, but he has recently come perilously near to qualifying. In McGhee *v.* Norfolk, etc., R. Co., 147 N. Car. 142, the facts were that the defendant railroad company had stored a quantity of dynamite in a shanty on its right of way. The plaintiff, with a companion, while engaged in shooting at a target, shot at a knot hole in the weatherboarding of the shanty, with results too obvious to require mention. The majority of the court held that the plaintiff had no cause of action against the railroad company, but Chief Justice Clark dissented, and, in the course of his opinion, remarked: "It does not appear whether the shot went through the knot hole or not, for after it was fired the hole was the only part of the building that remained."

KNOCKING THE BRETHREN. — "No member of his court, perhaps fortunately, has had sufficient personal experience to pass upon the question as to whether or not a slot machine such as is involved in this case is within the same class as the games prohibited by section 1 of the act we are considering, but an examination of the authorities cited by counsel in their briefs convinces us that some of the courts which have passed upon

statutes prohibiting gambling gave the subject of gaming and gambling devices deep and careful study, and evidently often burned the midnight oil pursuing their investigations and watching the votaries of the goddess of Fortune as they tempted fate by the turning of a card, the throwing of dice, or guessing the number and color on which the lively roulette ball would finally come to a stop." *Per* Mills, C. J., in Territory *v.* Jones, 14 N. M. 579.

FAILED TO QUALIFY. — Some two or three years ago a negro lawyer came to Osceola, Ark., from Tennessee, and applied for admission to the bar. He presented a license to practice in the Justice Courts and County Courts of Tennessee, but it developed that such a license could be obtained merely upon a certificate of good character from some reputable person, and he was therefore required to stand an examination. A committee of lawyers was appointed to examine the applicant, and it was suggested that the writer commence the examination by a few questions on the law of real property. After some two or three questions were asked and half-way answered, the following took place:

Q. What is an estate by courtesy?

The colored gentleman smacked his lips wisely and knowingly and answered: "An estate by courtesy, sah? An estate by courtesy is where one pusion is permitted to occupy and use the property of another pusson merely as a matter of courtesy. They don't pay no rent for it."

Q. What is an estate in remainder?

A. An estate in remainder, sah? An estate in remainder is where you convey a part of the property to one pusson and the remainder of the property to some one else.

Q. What is a fee simple title?

Again smacking his lips wisely, and repeating the question, he answered: "A fee simple title, sah? A fee simple title is the title of a female."

The next question, "What is a fee tail?" he was not permitted to answer, but was admonished by the court that for the present he was not qualified for admission to the bar.

AN ORATORICAL MASTERPIECE. — The following summing up to the jury was given some years ago in one of our Western States by the attorney for the defendant in a murder trial: "Gentlemen of the jury: Thou shalt not kill! Now, if you hang my client you transgress the command. Murder is murder, whether committed by twelve jurymen or by a single individual like my client. I do not deny the fact that my client has killed a man. No such thing, gentlemen. You may bring the prisoner in guilty, and the hangman will do his duty, but will that excuse you? No! In that case each of you will be murderers! Who among you is prepared to have the brand of Cain marked upon his brow to-day? — you, freemen in this land of liberty and light. I pledge you my word not one of you has a bowie knife. Your pockets are odoriferous with the fumes of cigars and tobacco. You may smoke the tobacco of rectitude in the pipe of a peaceful conscience, but hang my unfortunate client and the scaly alligators of remorse will gallop through the internal principles of your animal viscera until the spinal vertebræ of your anatomical construction will be converted into a gigantic railroad for the grim and gory goblins of despair. Beware, I say unto you, of meddling with the eternal prerogative; beware, I say, of committing murder! I adjure you by the manumitted ghost of temporary sanctity to do no murder! I adjure you by the name of woman — the mainspring of the ticking timepiece of time's theoretical transmigration — to do no murder! I adjure you by the American eagle, which whipped the universal gamecock of creation, and now lies roosting on the magnetic telegraph of time's illustrious transmigration, to do no murder! And, if you ever expect free dogs not to bark at you; if you ever expect to wear boots made of the free hide of Rocky Mountain buffalo; and to sum up all, if you ever expect to be anything but sneaking, rascally bits of humanity whittled down into indistinctability, acquit my client, and save your country."

Correspondence.

A WHISKEY ADVERTISEMENT.

To the Editor of LAW NOTES.

SIR: In "Obiter Dicta" in May LAW NOTES I see that it is stated that the Dubuque Star Brewing Company, of Dubuque, Iowa, will probably go down in history as the only brewing company advertising in the official law reports. In the same line with this there appears in State *ex rel.* West, Atty.-Gen., *v.* State Capital Co., 24 Okla., on page 254, a whiskey advertisement that probably "takes the cake."

E. B. HUGHES.

SAPULPA, OKLA.

APPEALS FROM THE INFERIOR NEW YORK CITY COURTS.

To the Editor of LAW NOTES.

SIR: In your issue of the LAW NOTES of May, 1911, under the heading "Observations Here and There," appears this item:

"In volume 126, N. Y. Supplement, judgments of the Municipal Court in the several districts of the borough of Manhattan were reversed by the Supreme Court in forty-four cases and affirmed in only fourteen cases. Judgments of the New York City Court, Trial Term, were reversed in nineteen cases and affirmed in four cases. Young practitioners in those lower courts evidently get a lot of encouragement as well as fun. For if they win there, very well; if they lose, the chances are from three to five in their favor on appeal."

That item may, as is stated therein, afford young practitioners a lot of encouragement as well as fun. But the facts are that of the appeals heard by the Appellate Term of the Supreme Court, which court hears all the appeals from the City and Municipal Courts of the city of New York, about seventy per cent. of the whole number are affirmed. When a case is reversed an opinion is always written and filed. It seldom happens, however, that an opinion is written upon the affirmance of a judgment. Generally, those cases only are reported in which opinions are written, and consequently those that are affirmed without opinion do not appear in the law reports.

The item above quoted is, therefore, to say the least, misleading, and in justice to the judges of the lower courts of the city of New York should be corrected.

S. H. BEVINS,
Confidential Clerk, Appellate Term of Supreme Court.
NEW YORK CITY.

[We thank our correspondent for correcting us. But it is fair to the writer of the erroneous paragraph to say that, being surprised at the large percentage of reversals, he examined every one of the memorandum cases reported at the end of the Supplement volume for the very purpose of checking himself, and was unaware that there was a body of unreported decisions. — ED. LAW NOTES.]

"INCREASING SENTENCE ON APPEAL."

To the Editor of LAW NOTES.

SIR: In connection with the paragraph under the above caption in your February issue (p. 217) your readers may be interested to know that this is not only permissible, but common under the Philippine practice. In Spanish times the prosecution exercised the right of appeal, but while this was terminated by a decision of the federal Supreme Court (Kepner *v.* U. S., 195 U. S. 100, reversing 1 Phil. 397, 727, and overruling U. S. *v.* Atienza, 1 Phil. 736, and U. S. *v.* Mendezona, 2 Phil. 353) the same eminent tribunal subsequently upheld the right of the Philippine Supreme Court to increase penalties imposed by the trial courts. Trono *v.* U. S., 199 U. S. 521, affirming 3 Phil. 213; Flemister *v.* U. S., 207 U. S. 372, affirming 5 Phil. 650.

One of the results is thus stated by former Justice Tracy in his able paper last year before the New York State Bar Association:

"More than once the court of second instance has been called upon to impose the death penalty upon a rash appellant from a judgment of imprisonment."

The effect in discouraging frivolous appeals can be inferred.

CHARLES S. LOBINGIER.

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Law Notes

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CONTENTS

Construction of the Anti-trust Act.

THE opinions of the United States Supreme Court in the Standard Oil Company and American Tobacco Company cases are condensed in another part of this number of LAW NOTES. The word "unreasonable" is read by the majority of the court into section 1 of the Anti-trust Act before the phrase "restraint of trade or commerce." Precedents authorizing courts to exercise such a liberty in construing statutes, while not so plentiful as blackberries, are yet so numerous and striking that a layman reading them might almost conclude that it is the positive duty of courts to decide that the framers of a statute meant, not what they said, but its opposite. The most complete collection of federal cases on both sides of the question is in the article "Statutes and Statutory Construction," 1 Fed. St. Ann. lxxvi–lxxx.

Brewer v. *Blougher,* 14 Pet. (U. S.) 198, and *U. S.* v. *Kirby,* 7 Wall. (U. S.) 482, were leading cases, but now *Holy Trinity Church* v. *U. S.,* 143 U. S. 457, is foremost. An Act of Congress of 1885 prohibited under a penalty any assistance or encouragement to aliens to migrate to this country under contract "to perform labor or service of any kind in the United States," etc., making specific exceptions of certain classes of aliens. The Church of the Holy Trinity, an incorporated religious society, made a contract with an alien by which he was to remove to the city of New York and enter into its service as rector and pastor; and in pursuance of such contract the alien did so remove and enter into such service. In an action against the corporation to recover the penalty prescribed the Supreme Court held, in the case above cited, that the transaction was not forbidden by the statute. After quoting the section of the act defining the offense, Mr. Justice Brewer, speaking for the unanimous court (including Mr. Justice Harlan), said:

"It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service and implies labor on one side with compensation on the other. Not only are the general words labor and service both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added 'of any kind,' and further, as noticed by the circuit judge in his opinion, the fifth section which makes specific exceptions, among them professional actors, artists, lecturers, singers, and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case."

For the powerful reasoning upon which Mr. Justice Brewer based his opinion we must refer the reader to the report of the case. *Cobb* v. *Judge, etc.,* 43 Mich. 289, is one of the many instances where courts have injected a word or words of qualification into constitutional provisions by application of the "rule of reason." In 1 Blackstone's Commentaries 60, 61, the following classical instances are given:

"The Bolognian law, mentioned by Puffendorf, which enacted 'that whoever drew blood in the streets should be punished with the utmost severity' was held after long debate not to extend to the surgeon who opened the vein of a person that fell down in the street with a fit. . . . There was a law that those who in a storm forsook the ship should forfeit all property therein, and that the ship and lading should belong entirely to those who stayed in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who by reason of his disease was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession and claimed the benefit of the law. Now, here all the learned agree that the sick man is not within the reason of the law; for the reason of making it was, to give encouragement to such as should venture their lives to save the vessel; but this is a merit which he could never pretend to, who neither stayed in the ship upon that account, nor contributed anything to its preservation."

Not having the advantage of personal conference with the legislators who passed the Anti-trust Act, the Supreme Court applied the same "rule of reason" that every one necessarily employs in reading the Ten Commandments or the Sermon on the Mount.

"Rule of Reason" Not an Unfamiliar Rule.

IN the course of his dissenting opinion in the case against the Standard Oil Company, Mr. Justice Harlan spoke as follows: "When Congress prohibited every contract, combination, or monopoly in restraint of commerce it prescribed a simple definite rule that all could understand and that could easily be applied to every one wishing to obey the law and not to conduct their business in violation of law. But now, it is to be feared, we are to have, in cases without number, the constantly recurring inquiry — difficult to solve by proof — whether the particular contract, combination, or trust involved in each case is or is not an 'unreasonable' restraint of trade." But if corporation managers punish their own children they must do so by the "rule of reason," or take the consequences

of conviction in a criminal prosecution for assault and battery, cruelty to children, or manslaughter. Has that ancient doctrine of the common law ever been declared unjust? If a school teacher should inflict corporal punishment upon a pupil who is the child of a trust magnate, would the latter admit that the teacher was not justly restrained by a "rule of reason"? When a Mississippian had a right to chastise his wife "within reasonable bounds" and "in cases of great emergency" (*per* Ellis, J., in *Bradley* v. *State,* Walk. (Miss.) 156), did any one complain that the limitations just quoted constituted an outrageous burden on the husband by compelling him to solve questions beyond the range of ordinary human faculties? The question whether a combination is "unreasonable" is "difficult to solve by proof," said Mr. Justice Harlan, perhaps in a sardonic mood. In the case against the American Tobacco Company, Chief Justice White alluded to "the subtle devices" invented by the legal advisers of the tobacco trust, but the court treated them as merely smart Aleck contrivances.

A Single Judge Dissenting.

IT is not an uncommon spectacle to see one justice of the United States Supreme Court dissenting from the concurrent opinions of all his associates. One or more solitary dissents appear in the reports covering any year of the decisions of that court, and the same phenomenon occurs in all other courts consisting of several judges. Infirmity of the infinite mind is a characteristic of all men, and there is no necessary or common unity of opinion on any question addressed to the human intellect except on mathematical subjects. On the question whether the evidence on an issue of fact was sufficient to take a case to the jury, appellate courts frequently disagree, with a single judge constituting the minority. As Macaulay remarked, speaking of religious opinions, "discrepancy there will be among the most diligent and candid, as long as the constitution of the human mind, and the nature of moral evidence, continue unchanged." (Essays, "Gladstone on Church and State.") It is certain that on some theological questions Chief Justice White and Mr. Justice McKenna would not agree with the other members of the Supreme Court, and perhaps President Taft would dissent from the entire nine — and all having the same data for forming opinions.

In *Thompson* v. *Thompson,* 218 U. S. 611, 31 Sup. Ct. Rep. 111, decided Dec. 12, 1910, the majority of the Supreme Court held that the common-law relation between husband and wife was not so far modified by section 1155 of the District of Columbia Code as to give the wife a right of action to recover damages from her husband for an assault and battery committed by him upon her person. Mr. Justice Harlan wrote a dissenting opinion in which he said:

"My brethren [the majority] think that, notwithstanding the destruction by the statute of the unity of the married relation, it could not have been intended to open the doors of the courts to accusations of all sorts by husband and wife against each other; and therefore they are moved to add, by construction, to the provision that married women may 'sue separately . . . for torts committed against them, as fully and freely as if they were unmarried,' these words: 'Provided, however, that the wife shall *not* be entitled, in any case, to sue her husband separately for a tort committed *against her person.*' . . . The judgment just rendered will have, as I think, the effect to defeat the clearly expressed will of the legislature by a construction of its words that cannot be reconciled with their ordinary meaning."

In that case Mr. Justice Harlan had the satisfaction of stating that he was "authorized to say that Mr. Justice Holmes and Mr. Justice Hughes concur in this dissent."

Sharp Colloquy between Court and Counsel.

A MONTH ago, several prominent white men on trial for peonage before a jury in the United States District Court for Georgia, Judge Speer presiding, were defended by counsel who is the attorney-general-elect of that State. In outlining the defense to the jury he repeatedly referred to the negro accuser of his clients as a "nigger." Finally Judge Speer said to him: "Don't you think the future attorney-general of the State of Georgia can spare us this 'nigger, nigger, nigger'? It sounds so unworthy of a great court of justice and so unworthy of your own position at the bar to be alluding to these poor unfortunate creatures constantly in the lower terms of degradation." It is well known that Judge Speer has a strong and sensitive instinct of humanity. To his respectful admonition counsel tartly replied: "I think I know my duties and rights as a lawyer, an American lawyer practicing in an American court." After Cinna protested that he was not the conspirator of that name, but Cinna the poet, "Tear him for his bad verses," cried the mob of Cæsar's avengers. We are inclined to think the flavor of fustian, rather than of contumacy, in counsel's reply, was chiefly responsible for the following retort:

"You are exceeding those rights, and if you continue on this line and insist upon using this language, which is nothing but an appeal to the lowest race prejudice, I will have to sever our relations not only in this case but in all cases in this court. I do not believe the American judiciary will tolerate the use of such language in the presence of a court of justice on the part of a gentleman who as a condition precedent to his admission to the bar has sworn to support the constitution and laws of the United States. Now I do not wish to do anything of the sort, but I do beg of you to use the language of which I know you are capable, the language of a cultivated gentleman, and save us this never-ending 'nigger, nigger, nigger.' I want you to act as becomes a lawyer in this court."

Thereupon counsel resumed his address, but did not again use the word "nigger." Perhaps the learned attorney-general had in mind "the ever-memorable struggle between Erskine and Mr. Justice Buller" — Lord Chief Justice Campbell's words — on the trial of the dean of St. Asaph, 21 How. St. Tr. 954:

Mr. Erskine. Would you have the word *only* recorded?
One of the Jury. Yes.
Mr. Erskine. Then I insist that it shall be recorded.
Mr. Justice Buller. Mr. Erskine, sit down, or I shall be obliged to interpose in some other way.
Mr. Erskine. Your lordship may interpose in what manner you think fit.

And Mr. Erskine did not subside nor remain silent. In those supreme moments no wonder the greatest jury lawyer that ever spoke the English language was nerved by the sudden and appalling gravity of the situation in respect to the vital interest of his distinguished client when the foreman of the jury pronounced the last word of the verdict, "Guilty of publishing only." An episode something different from counsel's insistence on a purely personal "right" to use a slang word offensive to the court and entirely unnecessary for any legitimate purpose.

"Nigger" Not a Determinately Offensive Word.

STILL, we suppose "nigger" is vernacular in Georgia, and not always and necessarily more opprobrious than the word "darkey." With Cordelia in his arms, King Lear's "And my poor fool is hang'd!" was a phrase of endearment, as all the world knows. "Now, God help thee, poor monkey," said Lady Macduff, admiringly, to her little son. If our memory is not at fault, Senator Tillman, who, like the Georgia attorney-general, had taken an oath to support the Constitution, used the word "nigger" in the course of a speech in the United States Senate in which he alluded with intense earnestness to the unquestionable fidelity of his servants at home. By the way, in Beach on Contributory Negligence "nigger" was one of the words in the letter "N" in the index. The author was a native of Kentucky. The second edition of his work was gotten out (with the author's supervision) by a legal-literary man from Connecticut, who compiled a new index for it and omitted the "nigger" title.

Simple and Useful Contrivance in Procedure.

IN the federal District Court in New York, May 23, partners in a firm of art and antique importers of world-wide fame pleaded guilty to a charge of conspiracy to defraud the government. In order that they might not have to go to jail, according to the practice of the court, pending the imposition of sentence, which was deferred until the next day, the judge permitted them to withdraw their plea of guilty and temporarily substitute pleas of not guilty, thus enabling them to be released for over night on bail. The use of similar devices to preserve the regularity and legality of proceedings is exceedingly common. In fact a good lawyer desiring to proceed in contravention of apparent obstacles on the record instinctively seeks first to remove them by invoking the discretionary power of the court, if the discretion may still be exercised. For instance, he asks the court to relieve him from a stipulation in the cause, before he takes steps inconsistent with the obnoxious agreement. He moves to vacate an order or judgment, or petitions for a rehearing, in order to obtain a respite against the statutory limit of time for appeal. Under the Evarts Act of 1891 the United States Circuit Court of Appeals may certify to the Supreme Court "any questions or propositions of law concerning which it desires the instructions of that court for its proper decision." The quoted clause clearly implies that the certificate is not to be granted *after* a decision has been rendered. But where judgment is rendered before it occurs to counsel for the defeated party that he would like to take the case to the Supreme Court on a certified question, is his opportunity snuffed out by the judgment? Not necessarily. Perhaps the court will accommodate him by granting a rehearing and then a certificate will be unobjectionable. This was done in *Wall* v. *Cox,* (C. C. A.) 101 Fed. Rep. 403, according to Mr. Justice Gray's statement in *Wall* v. *Cox,* 181 U. S. 244, 246, 21 S. Ct. Rep. 642, the circumstance not being reported anywhere else.

"ALL progress in social matters is gradual. We pass almost imperceptibly from a state of public opinion that utterly condemns some course of action to one that strongly approves it." *Per* Park, C. J., in *In re* Hall, 50 Conn. 132.

Medical Electricity.

IN *Young* v. *Town of Gravenhurst* (1910), 22 Ontario Law Rep. 291, the defendant maintained an electric light plant with wires carrying a primary current of about 2,200 volts. Other wires running from a transformer carried a secondary current of 110 volts and supplied the house of the plaintiff. By a curious set of circumstances, combining with the defendant's negligence, the primary wires got into communication with the secondary wires. "The stage was then all set for a tragedy," said the court. The plaintiff, eleven years old, lying in his bed about seven A. M. in March, with the light which hung over his bed for reading purposes turned on, noticed a sparkling, which indicated, as he thought, that the lamp was going out; he then took hold of the oscillating lamp with his left hand, and knew no more till some time after. The iron bedstead was in contact with a radiator, the latter being in contact electrically with the earth. The boy's left hand had to be amputated, and his skull was burned through to the brain in two places. Experts for the defense testified that the injuries were, in their opinion, caused by a low-tension current of 110 volts — and that all over this continent persons using electric light live in constant danger of suffering such injuries. All that is needed, they said, is to place the body in contact with a radiator or a water pipe, and put the hand to an unprotected lamp shoulder, and the mischief may be done. "This I do not believe," said Judge Riddell. They were contradicted by electrical experts called for the plaintiff, "whose evidence I believe," said the judge. A physician testified that the lad's heart was beating full and regularly immediately after the shock, but his breathing had been temporarily suspended, and that high-tension currents (when they do not kill) arrest the breathing but do not stop the heart. The judge quoted from Tousey's Medical Electricity, published in 1910: "High-tension currents cause death by respiratory paralysis, low-tension currents by cardiac paralysis, if they cause death at all;" and from H. Lewis Jones, Medical Electricity, published in 1894: "Strange to say, the effect of currents in arresting the heart is more evident with small than with large currents. . . . In cases of accident from contact with high-pressure conductors, and when large currents have traversed the patient's body, the heart beat may not be arrested, but there may be a profound inhibition of the respiratory centre."

Judgment for $7,500 in favor of the boy, and $2,250 to his mother for expenses of surgical operations, etc.

Expert Authors *Versus* Expert *Viva Voce* Witnesses.

AS to the expert opinion evidence in the foregoing Canadian case, "this I do not believe," said the court. A mild exclamation in view of the imbecilities, eccentricities, perjuries, and miscellaneous enormities, so frequently appearing in expert testimony. But does not the testimony thus discredited by the judge enable us, in Shakespeare's phrase, to "gather honey from the weed, and make a moral of the devil himself"? It was decisively overcome by the declarations of experts in their published works, in connection with a fact furnished by the lad's physician. Moral: A professional man's opinion expressed in a standard treatise, written by him for the instruction not only of the public but of other members of his profession, is entitled to more weight than the

opinions of professional men of no greater experience or ability that are sold to litigants for consumption by laymen on the bench or in the jury box. Take Darwin's famous proposition in his "Descent of Man:" "Our ancestor was a hairy quadruped furnished with a tail and pointed ears, probably arboreal in his habits." Surely, a biologist testifying in court, if he were of kin to an alienist of the "brainstorm" cult and receiving a fee of $1,000 or more, would not hesitate to affirm that man descended from anthropoid apes; that Darwin spoke with superfluous caution; and that Alfred Russel Wallace's statement in his recently published "World of Life" that at least twenty "missing links" are needed, instead of one, is not understandable.

Referring to expert testimony, "Thank th' Lord, whin th' case is all over. the jury 'll pitch th' testimony out iv th' window," said Mr. Dooley ("On Peace and in War").

Argument by Simile.

"I KNOW that it has been said by a distinguished judge 'that illustration is not argument,' but at times it is at least a very convenient substitute for it," observed Judge (now Chief Judge) Cullen in *Skinner* v. *Norman*, 165 N. Y. 565, 571, 59 N. E. Rep. 309, 310. A tip-top "near" argument by means of a hypothetical case appears in the Canadian case discussed in the foregoing paragraphs. Judge Riddle there remarked that much may be said for the view that a corporation undertaking to furnish electricity of a voltage of 110 must, at all hazards, keep from the buildings supplied, and from the wires intended to carry only 110 volts, their electricity of a higher voltage. "It may be," he continued, "that a corporation which contracts to deliver a tiger cub into a cage on certain premises is bound to see to it that a full-grown tiger of theirs is not delivered in its place."

Stockings Dyed by Pink Soft Drinks.

VERY amusing are some of the cases in the law reports describing the deceptions practiced by violators of "pure food and drugs" acts, and one often finds racy reading in cases between proprietors of medical compounds and certain delectable drinks of advertised "mickle might." See *Memphis Keeley Institute* v. *Leslie E. Keeley Co.*, 155 Fed. Rep. 964, 84 C. C. A. 112; *Missouri Drug Co.* v. *Wyman*, 129 Fed Rep. 623, a "man medicine" case; *Moxie Nerve Food Co.* v. *Madox Co.*, 152 Fed. Rep. 493, 502, where "by some remarkable coincidence of names a Lieut. Moxie was traveling among the Moxos Indians when he made his discovery." Last month the food and drug department of the State Board of Health in Indiana prepared an exhibit for public display. It is a dark pink stocking, dyed so as to resist the ordinary methods of laundering. The dye used was got from a bottle of summer soft drink such as may be encountered at almost any soft drink establishment. The bottle from which the dye stuff was taken was sent in by an inspector, and an examination in the laboratory led one of the chemists to believe that coal tar dye had been used in creating the beautiful strawberry color of the drink. As a test about one-fourth the contents of the bottle was poured into a bowl and a white stocking was soaked in the solution for a few minutes. It came out a beautiful pink, except the heel and toe, where other yarn had been used. Repeated washings by the chemist under conditions similar to those used in laundries failed to dislodge the color. "One might as well drink the ordinary dyes that are sold in the drug stores for dyeing woolen goods as to drink that stuff," said the chemist.

There is much cochineal dyestuff in beverages other than those obtained — unless by telepathy *et al.* — at drug store soda water fountains. Witness Falstaff's reported remarks about Bardolph, whose favorite tipple was sherris-sack:

Boy. Do you not remember, a' saw a flea stick upon Bardolph's nose, and a' said it was a black soul burning in hell-fire?

Bardolph. Well, the fuel is gone that maintained that fire. that's all the riches I got in his service.

King Henry V., Act II., sc. 3.

O Ye of Little Faith.

AFTER quoting the testimony of a witness, "Now this is so utterly incredible that the court must have the faith of ten men to believe it," said Sir William Scott (Lord Stowell), with his habitual directness of speech. The Rising Sun, 2 Rob. (Am. ed.) 87, 90.

"If a dying martyr said it with his last breath, it would stagger credulity." Speech of Mr. Adolphus in defense of Arthur Thistlewood, 33 How. St. Tr. 876.

In a debate on the Lorimer resolution in the United States Senate, May 26, Senator Borah of Idaho seemed to have faith far short of "ten men" strength. "We must all admit," said he, "that the men who are charged with participating in this corruption were not going about in the city of Chicago and trying to collect money as a mere pastime or a joke, and it must further appear conclusive that if there was any one putting up money for the purpose of paying for a seat in this chamber that they were doing so because they expected an interest in the seat when it was purchased. It sounds like a muttering of idiots to say that business men who do not expend ten dollars without knowing where the return is to come from would put $10,000 into the purchase of a seat in this chamber unless they expected some return from such investment. Such evidence requires reconsideration."

RELATION OF ASSUMPTION OF RISK TO CONTRIBUTORY NEGLIGENCE.

IF there is any subject of modern law which presents a perfect maze of inharmony, misunderstanding and confusion — utter chaos — it exists in the attempts to distinguish contributory negligence and assumption of risk one from the other. After a review of the authorities in search of information upon the subject, one will go, like Omar, "out of the same door wherein he went," empty handed, empty headed, and in some doubt as to the sanity either of the writers or the reader (himself). The writer hesitates to offer an explanation of the relation between assumption of risk and contributory negligence — to add anything to the burden of future investigators. The task is one for the superman or superjudge — if we may say so without being guilty of *lèse majesté*. However, the conflict and confusion disclosed by the opinions seem to justify any effort, irrational as it may appear.

The matter received practically no attention until quite recent times. In the past decade much thought, judicial and academic, has been devoted to distinguishing the one defense from the other. The cases are collected in a note in a recent volume of selected cases.*

That there is a difference between the defenses of assumption of risk and contributory negligence is conceded by nearly all of the courts. And the difference may be of practical importance under some circumstances; for example, under statutes permitting the servant to recover although he has assumed the risk of the dangerous instrumentality by which injury is produced. Likewise the servant in an action against the master may have to plead and prove one but not the other. And it may be questioned whether the burden of proof rests upon the same party in cases which are deemed to involve both defenses.

Many cases have been tried upon a misconception or lack of conception of the principles actually involved in controversy, and while the results reached doubtless were right in a majority, yet in some instances there must have been a miscarriage of justice; and although it may be conceded that the prime consideration of the law is to be practical, yet the system also should be scientific and philosophical.

Meaning of Terms. — The confusion arises in considerable measure, it appears, from a lack of agreement as to the meaning of terms. Terminology is always a fertile source of misunderstanding, and it seems to have been particularly so in this case. Counsel frequently confuse the terms "assumption of risk" and "contributory negligence." This has been pointed out in a considerable number of cases (the writer remembers having seen some half dozen or more). By jumbling and confounding "assumption of risk" and "contributory negligence," counsel frequently have led the courts into inaccuracies in the conception of the meaning of the expressions. Reading some of the instructions that have been presented and given, it seems inconceivable that the jury knew what the judge was talking about. They returned a "right" verdict not because of the charge, but in spite thereof. Until the courts reach some agreement as to the meaning intended to be conveyed by the expressions "assumption of risk" and "contributory negligence," the present confusion will continue.

An injury to a servant, so far as the present inquiry is concerned, may arise under the following conditions: (1) where neither party is negligent; (2) where the servant only is negligent; (3) where both parties are negligent; and (4) where the master alone is negligent. The term "contributory negligence" is commonly applied (frequently by the same court) to negligence occurring in two of these positions; that is, where the servant is negligent, the master not being negligent, and where both master and servant are negligent. As long as this dual meaning of the expression exists, an understanding of the opinions is difficult and in some instances quite impossible, it not appearing which of the two conceptions the court had in mind. The conception of contributory negligence as being negligence on the part of the servant contributing to the injury, the master being guilty of no negligence, should be eliminated.

"Contributory negligence" should be confined to the third of the positions above set forth, and may be defined as conduct in relation to a particular act or omission falling short of the standard of care imposed upon a servant and coöperating with negligence on the part of the master to produce the injury.

"Assumption of risk" has been given so many meanings or shadowings of meaning that the general confusion has been greatly assisted thereby. However, its meaning is better settled and more consistently used than is the case with the expression "contributory negligence." Assumption of risk is found only in the fourth position referred to above; it means that the conduct on the part of neither master nor servant was below the standard of care.

The conditions under which a servant may be injured, as above stated, and the relation of assumption of risk to contributory negligence, are made apparent by the following diagram:

MASTER		SERVANT		RESULTS
Conduct above standard of care	Injury	Conduct above standard of care	1.	*Assumption of risk*; recovery barred
		Conduct below standard of care	2.	Negligence of servant, recovery barred.
Conduct below standard of care			3.	*Contributory negligence* of servant, recovery barred
		Conduct above standard of care	4.	Negligence of master, recovery allowed

Many of the cases where the defenses of assumption of risk and contributory negligence apparently have been confused may be reconciled with principle by reading the term "negligence" in place of contributory negligence; in other words, the courts mean that the servant alone was remiss (position 2 in diagram), instead of that the servant was guilty of negligence coöperating with negligence of the master to produce the injury (position 3 in diagram).

Basis of Assumption of Risk. — In probably as many as a hundred reported opinions it has been asserted that the defenses of assumption of risk and contributory negligence are fundamentally and elementally different; and in numerous instances differences have been pointed out, the most popular explanation being that assumption of risk is based upon contract or the maxim *volenti non fit injuria,* whereas contributory negligence rests in tort or a breach of duty. Other theories have been offered, a résumé of which may be found in *Rose* v. *Minneapolis, etc., R. Co.,* 107 Minn. 266–270.

It is fallacious to say that "assumption of risk" is based upon contract; that it is an implied term of the contract of service, whereby the servant exonerates the master from liability for injury occurring from the general dangers of the employment. Otherwise we should have the rather startling result that an infant servant would not be bound by his agreement to assume the risk, and, by repudiating it, could recover. The truth is that there is no duty upon the master in respect of those sources of danger that inhere in the employment. There never was any obligation upon the master, and there is no "waiver," willingness, estoppel, or anything else on the part of the

* See 18 Ann. Cas. 960.

servant. If there is anything in the servant's mind it certainly must be an unwillingness to encounter the dangers of the service, since this would be prompted by the first and most compelling instinct of man — fear. Nor does the ancient maxim *volenti non fit injuria* explain the relative legal positions of master and servant, because that maxim conveys the idea of an exemption from liability that otherwise would exist, the intervention of the willingness to relieve the person causing the injury from fundamental liability. There is no fundamental liability of a master to a servant who is injured while in the employment. But there is no necessity for founding "assumption of risk" upon either contract or old *volenti non*, etc. Another explanation is possible — one that seems more consonant with other principles, and serves to harmonize many conflicting views. Why should the rule not be attributable to the commercial spirit of our race, which, to encourage business enterprises, held out to persons contemplating embarking therein the inducement of immunity from responsibility for injury to servants when such injury is not attributable to the negligence of the employer — the same spirit which gave rise to *caveat emptor*.

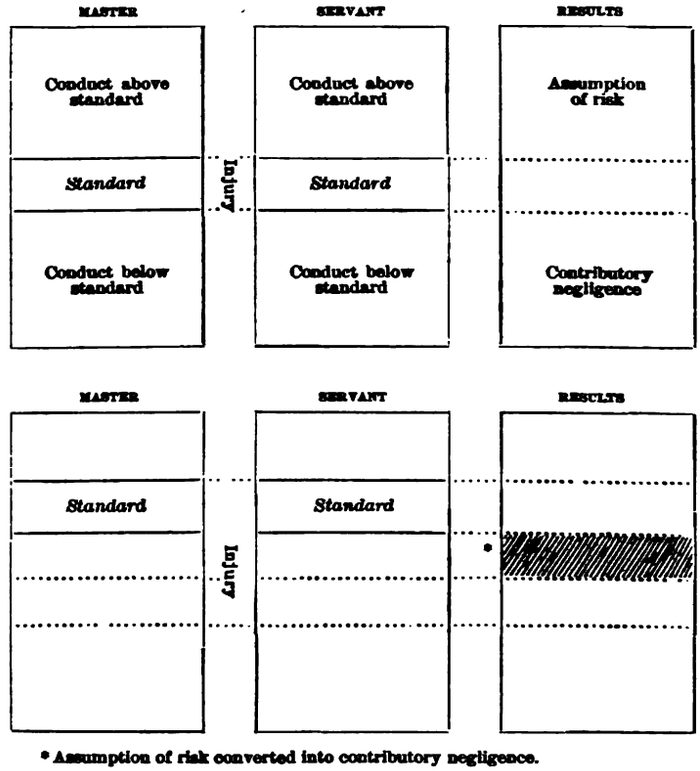
Standards of Care. — Contributory negligence and assumption of risk are not elementally or fundamentally different; they arise from the same source and are derived from the same principles. They differ only in relation to the existing standard of care.

Let us assume that the standard of care is perfection. If the master attains this standard there can be no such thing as an injury to the servant. But since the servant has been injured the master must have been negligent *measured by the standard of perfection*. Similarly, so long as the conduct of the servant is perfect he cannot be injured, notwithstanding the master's negligence. So in case he has sustained an injury, he too must have been guilty of negligence measured by the standard of perfection. Therefore in every case of injury both parties must have been negligent, measuring their conduct by some standard. The standard of care, however, is not perfection; it is that degree of care customarily exercised by masters and servants in the particular locality and at the particular time of the occurrence of the injury. Yet if the conduct of the parties did not fall short of this standard we find by reference to the diagram set forth above that the case is one of assumption of risk.

Consequently, what is assumption of risk according to one standard is contributory negligence measured by another standard. *By lowering the standard of care we convert contributory negligence into assumption of risk; by raising the standard we convert assumption of risk into contributory negligence.* And assumption of risk means anticipation on the part of the servant that the master will be negligent in some degree and that he himself will be negligent in some degree and that when the negligence of each is not below the contemplated standard of care the servant is not entitled to hold the master responsible.

Take the case of a railroad employee who has sustained an injury by getting his foot caught in an unblocked frog, the master being under no obligation to block frogs. The employee was proceeding along or across the track as employees usually do; he was an "old hand" and knew all about the tracks and dangers existing therein. This is a common mode of injury and ordinarily is said to have arisen from a danger or risk which the employee assumed; it is a case of assumption of risk. By exercising the care that employees are accustomed to exercise, he nevertheless was injured. The fact is that neither master nor servant was negligent according to the existing standard of care, or rules prescribing the quantum of care to be exercised. Now, manifestly by the exercise of care of a certain degree he would not have gotten his foot caught. If he had walked more slowly, or had carried a light, or had taken whatever extraordinary precaution the circumstances required, he would not have been injured. If we assume that these precautions are required by the existing standard of care, he was negligent. A neglect of these precautions is negligence measured by the standard of care prescribing them. In short, by raising the standard of care we convert care into negligence, assumption of risk into contributory negligence.

An understanding of the matter is assisted by the following diagrams:



* Assumption of risk converted into contributory negligence.

The standard of care varies in different countries and in different ages and stages of civilization. A determination of what it consists in is properly a function of the jury. A jury of Indians no doubt formulates a different sort of standard from that set up by a jury of cockneys, and the standard of a jury of Hoosiers differs from both. Therefore we have the standard of New York, the standard of Massachusetts, the standard of Pennsylvania, the standard of Illinois, and so on. And with this in view it is a simple matter to reconcile decisions that are conflicting when tested by the same standard. Assumption of risk in Colorado becomes contributory negligence in Connecticut. We know that a greater number of servants are injured upon American railways than upon railroads in Britain. Therefore the care customarily exercised by railway companies and their employees must differ in the two countries.

Some courts assert that the servant assumes the risk of

the master's habitual negligence. This has contributed not a little to the confusion and conflict upon the subject in hand. Adjusted to the theories above set forth, this assertion amounts to a lowering of the standard of care of the master. The master's "habitual negligence" is in fact no negligence at all, because it imposes no liability.

Pleading and Burden of Proof. — The issues raised by the pleas of assumption of risk and contributory negligence should be kept separated and distinct one from the other. A failure to do so has led to much confusion. The plea of assumption of risk amounts to an assertion that the master was not negligent. It is in fact equivalent to a plea of not guilty or a general denial. The plea of contributory negligence on the other hand is one in confession and avoidance; it admits negligence on the part of the master and asserts nonliability on the ground of negligence on the part of the servant.

The burden of proving that the servant assumed the risk means the burden of proving that the master has not been delinquent, and it is erroneous to impose upon the master the burden of proving it, as was done in a recent case, since it virtually compels the defendant to show that he was not at fault in contravention of a fundamental principle. If, as that court holds, the burden of proving freedom from contributory negligence is upon the servant, the result would be, under a plea of assumption of risk, a contest by each party to show lack of fault upon his part, a muddled condition that only needs, to make it complete, a presumption that both parties were at fault.

What is the result of requiring the plaintiff, as some courts have done, to plead and prove that the risk was not assumed? And what is the import of the following statement in a recent case? "Facts showing contributory negligence may also prove assumption of risk; but rarely, if at all, will proof that one did not assume a risk also show that at a given time he was in the exercise of ordinary prudence for his own safety."

BERKELEY DAVIDS.

STANDARD OIL COMPANY DISSOLVED.

IN *United States* v. *Standard Oil Company* of New Jersey, about seventy subsidiary corporations, and seven individual defendants (Circuit Court for the Eastern District of Missouri), 173 Fed. Rep. 177, decided in November, 1909, by Judges Sanborn, Van Devanter, Hook, and Adams, the defendants were adjudged to have violated the Anti-trust Act of 1890, and an injunction was granted against them. The alleged illegal acts are so familiar to our readers that space need not be taken for extended statement thereof. An appeal was taken direct to the Supreme Court (pursuant to the Act of Feb. 11, 1903, c. 544, 32 St. L. 823, 10 Fed. St. Ann. 199), where the decree of the Circuit Court was affirmed on May 15, 1911. Following is a résumé, substantially in the language of the court, of the opinion then delivered by Chief Justice White, and a brief statement of Mr. Justice Harlan's dissenting opinion.

Text of the Sherman Act.

The Sherman Act, or Anti-trust Act, so called, is the Act of July 2, 1890, c. 547, 26 St. L. 209, 7 Fed. St. Ann. 336. Its title is "An Act to protect trade and commerce against unlawful restraints and monopolies." The first and second sections are as follows:

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The Mischief to be Remedied.

The debates in Congress, to which the court may resort as a means of ascertaining the environment at the time of enactment of a particular law, that is, the history of the period when it was adopted (see numerous authorities quoted and cited 1 Fed. St. Ann. xxxv, xxxvi), "conclusively show that the main cause which led to the legislation was the thought that it was required by the economic condition of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally."

"Restraint of Trade" and "Monopoly" in England.

The terms "restraint of trade" and "monopoly" or "monopolize" took their origin in the common law, and their meaning, at least their rudimentary meaning, was also familiar to the law of this country prior to and at the time of the enactment of the Anti-trust Act. As to a "contract in restraint of trade" it became the English doctrine that if the restraint was partial in its operation and was otherwise reasonable the contract was valid. Monopolies were defined by Lord Coke (3 Inst. 181) and by Hawkins (Hawk. P. C. l. c. 79). The evils which led to the public outcry against monopolies and to the final denial of the sovereign power to create them may be thus summarily stated:

1. The power which the monopoly gave to the one who enjoyed it to fix the price and thereby injure the public.
2. The power which it engendered of enabling a limitation on production.
3. The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale.

The sovereign power being denied, the next step was a prohibition against the creation of monopolies by individuals, at least so far as the necessaries of life were concerned, and to that end Parliament passed laws relating to offenses such as forestalling, regrating, and engrossing. The definition of engrossing is found in 5 and 6 Edward

VI., c. 14 (quoted by the court). As by the statutes providing against engrossing, the quantity engrossed was not required to be the whole or an approximate part of the whole of an article, it is clear that there was a wide difference between monopoly and engrossing, etc. But, as the principal wrong which it was deemed would result from the monopoly, that is, an enhancement of the price, was the same wrong to which it was thought the prohibited engrossment would give rise, it came to pass that monopoly and engrossing were regarded as virtually one and the same thing. By operation of the mental process which led to considering as a monopoly acts which, although they did not constitute a monopoly, were thought to produce some of its baneful effects, so also because of the impediment or burden to the due course of trade which they produced, such acts came to be referred to as in restraint of trade.

But the development of more accurate economic conceptions and the changes in conditions of society compelled a recognition that the acts prohibited by the engrossing, forestalling, etc., statutes did not have the harmful tendency which they were presumed to have when the legislation concerning them was enacted, and therefore did not justify the presumption which had previously been deduced from them, but, on the contrary, such acts tended to fructify and develop trade. It is remarkable that nowhere at common law can there be found a prohibition against the creation of monopoly by an individual. Prohibitions as to individuals were directed not against the creation of monopoly, but were only applied to such acts, in relation to particular subjects, as to which it was deemed, if not restrained, some of the consequences of monopoly might result. This was but an instinctive recognition of the truisms that the due course of trade could not be made free by obstructing it, and that an individual's right to trade could not be protected by destroying such right. Outside of the restrictions resulting from the want of power in an individual to voluntarily and unreasonably restrain his right to carry on his trade or business, and outside of the want of right to restrain the free course of trade by contracts or acts which implied a wrongful purpose, freedom to contract and to abstain from contracting and to exercise every reasonable right incident thereto became the rule in the English law. The scope and effect of this freedom to trade and contract is clearly shown in *Mogul Steamship Co.* v. *McGregor,* (1891) A. C. 25.

"Restraint of Trade" and "Monopolies" in United States.

In this country, as had been the case in England, practical common sense caused attention to be concentrated not upon the theoretically correct name to be given to the condition or acts which gave rise to a harmful result, but to the result itself and to the remedying of the evils which it produced. It came to pass that contracts or acts which it was considered had a monopolistic tendency, especially those which were thought unduly to diminish competition and hence to enhance prices — in other words, to monopolize — came also in a generic sense to be spoken of and treated as they had been in England as restricting the due course of trade, and, therefore, as being in restraint of trade. In the evolution of legislative enactments and judicial decisions, "it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations led, as a matter of public policy, to the prohibition or treating as illegal of all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy." Furthermore, following the line of development of the law of England, contracts or acts were at one time deemed by the legislatures or the courts to be of such a character as to justify the inference of wrongful intent which were at another period thought not to be of that character.

Construction of Anti-trust Act.

Where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary — is a settled principle in the interpretation of statutes. Guided by that principle, we find that section 1 of the Anti-trust Act was drawn in the light of the existing practical conceptions of the law of restraint of trade; that it intended not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which constitute an interference that is an undue restraint; and as the contracts or acts embraced in the provisions were not expressly defined they "called for the exercise of judgment, which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus, not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law of this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether in a given case a particular act had not brought about the wrong against which the statute provided."

"A consideration of the text of the second section serves to establish that it was intended to supplement the first, and to make sure that by no possible guise could public policy embodied in the first section be frustrated or evaded. . . . And, of course, when the second section is thus harmonized with and made, as it was intended to be, the complement of the first, it becomes obvious that the criterion to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of the reason guided by the established law and by the plain duty to enforce the

prohibitions of the act, and thus the public policy which its restrictions were obviously enacted to subserve. . . . By the omission of any direct prohibition against monopoly in the concrete it indicates a consciousness that the freedom of the individual right to contract, when not unduly or improperly exercised, was the most efficient means for the prevention of monopoly. . . . In other words, that freedom to contract was the essence of freedom from undue restraint on the right to contract."

"The Light of Reason."

Unless judgment is to be exercised in interpreting the act, it must follow that the statute is destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce; or that, as the statute did not define the things to which it related, and excluded resort to the only means by which the acts to which it relates could be ascertained — the light of reason — the enforcement of the statute was impossible because of its uncertainty. "The merely generic enumeration which the statute makes of the acts to which it refers, and the absence of any definition of restraint of trade as used in the statute, leaves room for but one conclusion, which is, that it was expressly designed not to unduly limit the application of the act by precise definition, but, while clearly fixing a standard, that is, by defining the ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case, whether any particular act or contract was within the contemplation of the statute. . . . The construction which we have deduced from the history of the act and the analysis of its text is simply that in every case where it is claimed that an act or acts are in violation of the statute the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied." And "this doctrine is established by all of the numerous decisions of this court which have applied and enforced the Anti-trust Act, since they all in the very nature of things rest upon the premises that reason was the guide by which the provisions of the act were in every case interpreted." In so far as "it may be conceived that the language" of the court in the cases of *U. S.* v. *Freight Ass'n,* 166 U. S. 290, and *U. S.* v. *Joint Traffic Ass'n,* 171 U. S. 505, "conflicts with the construction which we give the statute, they are necessarily now limited and qualified."

Constitutional Objections Considered.

Arguments that the statute is unconstitutional, based upon the decision in *U. S.* v. *E. C. Knight & Co.,* 156 U. S. 1, "have been so necessarily and expressly decided to be unsound" in subsequent cases "as to cause the contention to be plainly foreclosed and to require no express notice." Argument that the statute constitutes a deprivation of due process of law is demonstrated to be unsound by the construction now given to the statute. And "so far as the arguments proceed upon the conception that in view of the generality of the statute it is not susceptible of being enforced by the courts because it cannot be carried out without a judicial exertion of legislative power, they are clearly unsound. . . . Take, for instance, the familiar cases where the judiciary is called upon to determine whether a particular act or acts are within a given prohibition depending upon wrongful intent. Take questions of fraud. Consider the power which must be exercised in every case where the courts are called upon to determine whether particular acts are invalid which are, abstractly speaking, in and of themselves valid, but which are asserted to be invalid because of their direct effect upon interstate commerce."

Conclusion on the Facts.

The court proceeds to consider the facts indisputably established substantially as alleged in the bill, and states the reasons for its conclusion, agreeing with the court below, "that the acts and dealings established by the proof operated to destroy the 'potentiality of competition' which otherwise would have existed to such an extent as to cause the transfers of stock which were made to the New Jersey corporation and the control which resulted over the many and various subsidiary corporations to be a combination or conspiracy in restraint of trade and in violation of the first section of the act, and also an attempt to monopolize and a monopolization bringing about a perennial violation of the second section."

The Decree.

The decree of the court below, affirmed by the Supreme Court, adjudged that the New Jersey corporation, in so far as it held the stock of various subsidiary corporations, was an illegal combination, and commanded its dissolution by directing in effect the transfer by the New Jersey corporation back to the stockholders of the subsidiary corporations the stock which had been turned over to the former, and enjoined them all from further conspiracy or combining to violate the Anti-trust Act. The decree does not deprive the stockholders of the corporations, after the dissolution of the combination, of the power to make normal and lawful contracts or agreements, and the court suggests certain agreements and combinations that would be lawful. The court below allowed thirty days for the parties to execute the decree, but the Supreme Court orders that the time be extended so as to embrace a period of at least six months. All the justices concurred except Mr. Justice Harlan.

Mr. Justice Harlan Dissents.

In a dissenting opinion of about 8,000 words Mr. Justice Harlan discusses the genesis of the Anti-trust Act; quotes from the opinion in the trans-Missouri freight case (166 U. S. 290); points out that Congress afterward declined to amend the act by excepting from its operation contracts, combinations, and trusts that did not unreasonably restrain interstate commerce; quotes from later opinions of the Supreme Court; and concludes that the "rule of reason" adopted by the majority of the court is a "usurpation by the judicial branch of the government of the functions of the legislative department;" that "the court has now read into the Act of Congress words which are not to be found there," and "by interpretation of a statute changed a public policy declared by the legislative department;" "that there is abroad in our land a most harmful tendency to bring about the amending of constitutions and

legislative enactments by means alone of judicial construction;" and that "to overreach the action of Congress merely by judicial construction, that is, by indirection, is a blow at the integrity of our governmental system, and in the end will prove most dangerous to all."

DEFERRED ANNUITY INSURANCE *VERSUS* THE BANKRUPTCY LAW.

A RECENT opinion of the Circuit Court of Appeals (184 Fed. Rep. 1) involves a question which should receive the earnest attention of such of the gentlemen of the bar as have occasion to practice in the bankruptcy courts. The facts were as follows: One Edwin J. Dunning, who was insolvent at the time, secured from the Mutual Life Insurance Company of New York three policies, which were designated "deferred annuity contracts," whereby the company obligated itself to pay to Dunning $1,000 yearly, under each contract or policy, commencing in 1916, 1921, and 1926, respectively, provided Dunning was then alive; and the payments were to continue as long as Dunning should live. The total amount paid by Dunning for these policies or contracts was $4,920.

It was practically conceded that Dunning was insolvent, and that he was acting in general bad faith with respect to his creditors, and that he was scheming, by fraudulent means, to obtain money which he never intended to pay; and, in rendering its decision, the court assumed that at a time, at least as early as the date of the policies, Dunning was engaged in transactions of a hazardous and fraudulent character, whereby he was to secure financial advantages and securities for which he did not intend to pay; but the court said: "We are not aware that the proofs establish any precise fact connecting any particular fraudulent transaction under which he was to receive money with the particular transaction of securing the deferred annuities or insurance. It is, however, probably quite true that the policies were paid for with money which he fraudulently obtained." It was admitted that the insurance company acted in good faith and without having any ground to suspect the existence of any fraudulent intent on Dunning's part.

The bill filed by Dunning's trustee offered to surrender the insurance contracts and prayed that the company be ordered to pay to the trustee, upon such surrender, the sum received from the bankrupt. The court (reversing the Circuit Court) dismissed the bill without prejudice to any right the trustee might have to claim whatever beneficial interest the bankrupt then had, or might thereafter have, under the insurance contracts; such decision being based on the theory that the insurance company had acquired "rights and advantages" upon which it was entitled to stand.

It would seem that, in such a case, it would be a very easy matter to ascertain the exact amount equitably due the insurance company for the risk incurred, to which might be added its reasonable expenses, and in that way that the creditors would get their just dues less such expenditure. As was said in the Slingluff case (106 Fed. Rep. at p. 158), "there would seem to be no reason why the deposits in a life insurance company to secure a sum payable to the assured at a given date, if he should be then alive, should be treated differently from a similar contract with a savings bank or building association." E. T.

"WE regard the ignorance of the first colonists of the technicalities of the common law as one of the most fortunate things in the history of the law." *Per* Mr. Justice Bell in Boston, etc., R. Co. *v.* State, 32 N. H. 215, 231.

REVISION OF RULES OF PRACTICE FOR COURTS OF EQUITY OF THE UNITED STATES.

THE following communication will be of interest to all lawyers practicing in the federal courts:

WASHINGTON, D. C., *June* 9, 1911.

The Supreme Court of the United States desires to consider the subject of revising the Equity Rules, and in connection with that subject the reformation of pleading and practice in equity cases in the courts of the United States, to the extent that that matter is subject to the Court's authority under sections 913 and 917 of the Revised Statutes of the United States. The Court, therefore, prior to its adjournment for the term, appointed a committee from among its membership with directions to consider and report such changes as the committee may conclude would, if adopted, tend to the simplification of pleading and practice and the correction of any unnecessary delay or unreasonable cost resulting from practices under the rules as they now exist.

The committee thus appointed is advised that the subject-matter which it is appointed to consider has been for some time under investigation by a committee of the American Bar Association, and of course it will gladly receive and consider any definite suggestion which that committee may deem it proper to make as the result of its work.

Desiring, however, before it makes its report to the Court, to have the benefit of every possible suggestion from all sources, the committee appointed by the Court earnestly requests the coöperation of the several Circuit Courts of Appeal of the United States. To this end it ventures to suggest that each of those courts appoint a committee of at least three from their respective bars to prepare and suggest such changes in pleading and practice in equity in the courts of the United States as such committee may deem it would be wise to adopt, and when the changes are put into definite shape, to file the same with the secretary of this committee at the earliest possible moment, certainly on or before the 1st day of November next.

While not desiring to exclude any definite suggestion from any judge or from any member of the bar, the committee hopes, in order to avoid complexity, that any suggestion which it is thought best to make may be forwarded through the instrumentality of the committee of the bar to be appointed by the respective Circuit Courts of Appeal, as above requested.

EDWARD D. WHITE.
HORACE H. LURTON.
WILLIS VAN DEVANTER.

Address all communications to
WM. J. HUGHES, *Secretary*,
Care of Supreme Court of the
United States, Washington, D. C.

Cases of Interest.

PRELIMINARY INJUNCTION IN COPYRIGHT CASE. — In White *v.* Bender, 185 Fed. Rep. 921, it was held on a motion for a preliminary injunction in a suit by a publisher of a text book on Corporations written by one White, against another publisher of a text book on Corporations written by one Frost, for infringement of copyright, that the motion should not be granted, there being no sufficient evidence that so much had been taken from White by Frost that the value of White's book was sensibly diminished, or that the labors of White were substantially to an injurious extent appropriated by Frost, or that one would purchase Frost assuming it to be White; and it appearing that the defendant was a responsible party.

REMEDY OF STRANGER WHO PAYS DEBT OF ANOTHER. — In S. M. Smith Ins. Agency *v.* Hamilton Fire Ins. Co., 71 S. E. Rep. 194, it was held that whatever might be the rule in other jurisdictions in West Virginia, the rule is that a stranger who pays a debt without request by the debtor, when his payment is not ratified by the debtor, may bring a suit in equity praying relief in the alternative; that is, that if the debtor does not ratify such payment, the debt may be enforced in his favor as its equitable assignee, or, if so ratified, that he be decreed repayment of the amount paid for the use of the debtor.

REVOCABILITY OF PERMIT TO CORPORATION TO USE STREET FOR A PURPOSE. — In *In re* New York Elec. Lines Co., (N. Y.) 94 N. E. Rep. 1056, it was held that the mere granting of a permit by a city to a corporation to use the streets for a purpose was but a license revocable at the pleasure of the city, where it had not been accepted and no substantial part of the work contemplated by the permission had been performed, as no right of property had been created to form a consideration for the contract. The court said: "Should a public service corporation be permitted to acquire an irrevocable franchise by mere acceptance without spending a dollar by way of performance, and then hold up the public in its enjoyment of the privileges contemplated by the grant indefinitely, or until they can be bartered away for a fortune? Should the municipalities to whom the legislature has delegated the right to grant permits for the use of their streets for public service purposes be denied the power to revoke licenses granted, in case of failure of the grantee to render substantial performance? We think not. No reasons for the deprival of the municipalities of such power are suggested, and none are apparent to our minds."

TRUSTEE PROCESS AGAINST NATIONAL SOLDIERS' HOME. — In Brooks Hardware Co. *v.* Greer, (Me.) 79 Atl. Rep. 681, the action was assumpsit, on an account annexed, brought in the Supreme Judicial Court for Kennebec county, Me., in which the National Home for Disabled Volunteer Soldiers was summoned as trustee. The principal defendant was defaulted. It was admitted that the alleged trustee had entered into a written contract with the principal defendant for the complete construction of the improvements of the sewerage and drainage system of the Eastern branch of the National Home for Disabled Volunteer Soldiers, located at Chelsea, in said county of Kennebec, and the plaintiff introduced evidence tending to show a balance due the principal defendant in the hands of the treasurer of the home at the time of the service of the writ upon the alleged trustee. The case was heard by the presiding justice of the Supreme Court upon the preliminary question whether the National Home could be legally charged as trustee in this action, and the justice ruled that it could not be so charged, because it was a disbursing agent of the United States government. The case then went to the full bench on plaintiff's exceptions to that ruling, where it was held that the National Home was not subject to trustee process in an action brought in a State court, as the institution could not properly be regarded as having its place of business "within the State" within the process statutes, since the State ceded to the United States government jurisdiction over the lands on which the home was situated.

CONSTITUTIONALITY OF STATUTE LIMITING NEW TRIALS TO QUESTION OF DAMAGES. — In Opinion of Justices, 94 N. E. Rep. 846, the opinion of the Massachusetts Supreme Judicial Court was requested respecting the constitutionality of a proposed bill the first section of which provided in substance that whenever a verdict was set aside and a new trial granted, if the sole ground of granting the motion was that the damages awarded were either inadequate or excessive then the new trial should be limited to the question of the amount of damages, and the second section of which provided that if a verdict rendered in behalf of a plaintiff was set aside as provided in the first section and at a subsequent trial of said case a verdict was again rendered in behalf of the plaintiff, a new trial, if granted, should be limited to the question of damages, unless the verdict was set aside and a new trial granted for fraud. It was the opinion of the justices that the first section would be constitutional, but that the second section would be unconstitutional. As to the second section, the justices said: "The third question, which refers to the second section of the proposed act, requires us to consider whether the legislature can deprive a defendant, in whose favor a motion for a new trial has been granted, of his right to have the second, or any subsequent trial, conducted to a final result, in accordance with the salutary methods secured to him by the Constitution, which include the presence of a judge who has power to set aside the verdict if justice requires it. This question must be answered in the negative. The constitutional right to a trial by jury in actions at common law continues in every case until a verdict is rendered which is so far supported by the law and the evidence that the court ought not to set it aside. The right of the party in a trial never can be diminished or impaired by the fact that there has been a previous trial of the same case which resulted in nothing that the law could approve. Affecting this third question, there is an independent consideration under the Fourteenth Amendment of the Constitution of the United States, which we will not consider at length. Under that amendment, every person within the jurisdiction of the commonwealth is entitled to the equal protection of the laws. Under the second section of the proposed act, there is an attempted limitation upon the power of the court to set aside a second verdict for a plaintiff upon motion of a defendant, when there is no similar limitation upon the power of the court to set aside successive verdicts for a defendant upon motion of the plaintiff. It is at least very doubtful whether the constitution permits such a discrimination between the parties to a suit in reference to their right to have a verdict set aside if it is against the law and the evidence."

PREMEDITATED SUICIDE WITHIN A YEAR AFTER THE ISSUANCE OF AN INSURANCE POLICY AS A DEFENSE WHERE SUICIDE FOLLOWS AFTER A YEAR. — In Harrington *v.* Mutual Life Ins. Co., 131 N. W. Rep. 246, which was an action on a life insurance policy containing a clause as follows: "It is hereby warranted and agreed that I will not die by my own hand, whether sane or insane, during the period of one year next following the said date of issue," it was held not to be a valid defense that the insured, who committed suicide a year after the issuance of the policy, premeditated suicide prior to the expiration of the year. The court said: "The appellant cites Ritter *v.* Mutual Life Ins. Co., 169 U. S. 139, 18 Sup. Ct. Rep. 300, 42 L. ed. 693. The policy in that case contained a clause that the insured warranted and agreed that he would not die by his own act, whether sane or insane, during the period of two years, which period was to begin on the 6th day of November, 1891. The insured committed suicide Oct. 5, 1892. The court, however, goes on to decide that suicide is not in the contemplation of the parties when they enter into a policy of life insurance, stating that: 'If a person should apply for a policy expressly providing that the company should pay the sum named if, or in the event that, the insured at any time during the continuance of the contract committed self-destruction, being at the time of sound mind, it is reasonably certain that the application would be instantly rejected. It is impossible to suppose that an application of that character would be granted. If experience justifies this view, it would follow that a policy stipulating generally that the payment of a sum named in it, upon the death of the assured,

should not be interpreted as intended to cover the event of death caused, directly and intentionally, by self-destruction, whilst the assured was in sound mind, but only death occurring in the ordinary course of his life.' This opinion was written in 1897, and it is a sufficient answer to this dictum to say that almost all of the insurance companies now write policies where the possibility of self-destruction while sane is clearly taken into account, and is among the risks assumed; some companies making a time limit and others not. . . . It is no defense to say that life insurance imports a mutual agreement, whereby the assured is to do all in his power to prevent liability. The company knew that, so far as the agreement with the insured was concerned, and so far as their risks assumed were concerned, he was at liberty to commit suicide while sane at any time after the period of limitation fixed by the contract. The morality of the fact is not involved in this case. The insured, by his self-destruction, has put himself beyond the realm of human law, and the morality of his act will be judged by a different court. The event which happened having been within the contemplation of the parties, and the parties having voluntarily shortened the actual period during which, if the act occurred, the company would not be liable, we hold that the time limitation of the act of suicide had expired at the time of the self-destruction of the insured, and that the company thereupon became liable for the full amount of the policy."

LIABILITY OF AGRICULTURAL ASSOCIATION FOR DAMAGES RESULTING FROM BALLOON ASCENSION AT FAIR. — In Canney *v.* Rochester Agricultural and Mechanical Assoc., 79 Atl. Rep. 516, which was an action for damages for personal injuries sustained by the plaintiff because of the alleged negligence of the defendant, the facts were as follows: The defendant conducted a four-days' fair at Rochester in August, 1909, and agreed with one Kelly for a balloon ascension and parachute jump each day. Kelly was to furnish the balloon, which was abandoned in the air when the operator made his descent. It would find its way to earth at some point within half a mile of the point where it was abandoned, and the defendant was to furnish a team to haul it back to the fair grounds. The defendant knew the balloon might go in any direction; its course being determined by the air currents. There were several highways within a radius of a half mile of the place of ascension, where persons were likely to be traveling; and travel was likely to be greater on days when a fair was held. The defendant took no precaution to warn such travelers. While the plaintiff was driving over one of these highways, being in the exercise of due care, the abandoned balloon descended upon her wagon, and inflicted the injuries complained of. There was a verdict for the plaintiff, and the case was transferred to the Supreme Court on exceptions, with the result that the exceptions were overruled. The court said: "Evidence that no accident had happened in the previous years when balloon ascensions were made was offered by the defendant, and was excluded. The defendant's position appears to have been that this fact had some tendency to show that an accident was not likely to happen. It is not apparent in what way it tended to prove the fact sought to be shown. The proposition that such an accident as this might have followed any ascension cannot be controverted. It is equally plain that the percentage of cases in which an accident would occur would be small. All this was well known to the defendant, and must have clearly appeared to the jury from a consideration of the geographical features of the country surrounding the fair ground. If a question of tendency, capacity, or the like were involved, the evidence might be competent. But there is no such element here. If experience had established certain facts or probabilities as to the course and distance the balloon would travel before a wind of the direction and velocity shown on the day in question, or if it had tended to establish other material facts, the result might have been admitted in evidence, if it appeared to the court to be sufficiently related to the fact in issue to be of value in the determination thereof. There is no suggestion of such an element in the facts offered. The course the balloon would take was dependent upon the direction of the wind. This essential element in a comparative test is not found in the proffered evidence. If this did not render the evidence wholly irrelevant, and therefore inadmissible as matter of law, it at least left it so inconclusive as to be plainly immaterial, and therefore inadmissible, if found to be 'too remote to be useful.' Upon this issue the presiding justice found in favor of the plaintiff. After it was determined, as matter of fact, that the question 'should be excluded,' its inadmissibility in that trial was established as matter of law."

LIABILITY OF CARRIER FOR INJURY TO PASSENGER DUE TO COLD STATION. — In Brackett *v.* Southern R. Co., (S. C.) 70 S. E. Rep. 1026, it appeared that on Jan. 16, 1909, the plaintiff Lucy A. Brackett purchased at Gaffney a ticket over defendant's road from that place to Union, S. C., and took a train leaving Gaffney about two o'clock P. M., and arriving at Spartanburg about three o'clock P. M. There was no train leaving Spartanburg for Union until about eight o'clock P. M. The five hours intervening between her arrival at Spartanburg and her departure for Union the plaintiff spent in the waiting room at defendant's station. The plaintiff recovered judgment for $200 on a complaint alleging that, although the day was very cold, the defendant did not have its waiting room heated, and its agent paid no attention to the request of plaintiff's husband that it should be made comfortable; that plaintiff was a stranger in Spartanburg, without the means to pay for entertainment elsewhere; and that the exposure to cold during her menstrual period resulted in serious and permanent sickness. There was evidence tending to sustain these allegations of the complaint. On the other hand, it appeared that the plaintiff could have taken a train leaving Gaffney at about seven o'clock P. M., and making close connection at Spartanburg with the train for Union, and that there was a hotel very near defendant's station, where plaintiff could have waited in comfort without charge. The judgment recovered was affirmed on appeal. The court said: "In the light of this case it must be held that it was for the jury to say whether the plaintiff should have anticipated that she would be made sick by remaining in the cold room, whether by reasonable effort on her part she could have found accommodations elsewhere, and whether she should have imposed on the railroad company the burden of providing accommodations for so long a time at Spartanburg, when she could have taken a later train and made close connection at Spartanburg. It is true, as defendant's counsel contends, that the evidence shows that the injuries complained of would not have resulted to the plaintiff from remaining in a cold room, had she not been in a state of susceptibility to ill effects of cold from her menstrual period. But we cannot accept the view that the presence of a woman's menstrual period is an abnormal condition, like weakness due to disease, of which the defendant was entitled to special notice. On the contrary, that condition is normal, and must be so regarded and taken notice of by carriers whose duty it is to provide reasonable accommodations for passengers of both sexes. That duty does not extend to making special provision, without notice, for women who are peculiarly delicate or abnormal in their susceptibility to cold in such condition, but it does extend to reasonable consideration and provision for the comfort of healthy women, whose capacity to travel is not materially affected by such condition. . . . The public business of carrying passengers is now so controlled by a few persons or corporations that those who travel must of necessity use their stations and waiting rooms, and with in-

creasing population the number of persons using these stations is constantly on the increase. The arrangements for the comfort and health of all classes of the general public — women and children, the old and the feeble, the ignorant and inexperienced — are under the exclusive control of the carriers, and it seems but reasonable that they should be held to a very high degree of care in providing at their stations for the safety and comfort of those whom they impliedly invite to use their stations and waiting rooms."

TESTIMONY OF NON-EXPERTS AS TO SPEED OF AUTOMOBILE. — In Dugan *v.* Arthurs, 79 Atl. Rep. 626, the action was trespass brought by the plaintiff to recover damages for personal injuries which she sustained by a collision with the defendant's automobile. The defendant was the owner of the machine and, it was alleged, was operating it himself at a dangerous and reckless rate of speed at the time of the accident. He was driving on North Highland avenue in the city of Pittsburg, and, in passing a street car standing at the intersection of the avenue with Hoevler street, the machine struck and severely injured the plaintiff while she was attempting to cross the avenue. On the trial of the cause two witnesses were called by the plaintiff, and, after testifying that the automobile was running at a high rate of speed at the time of the accident, were asked to give the rate of speed at which the machine was traveling. The question was objected to by the defendant, the objection was overruled, and the witnesses were permitted to answer. There was a verdict and judgment for the plaintiff, the defendant appealed, and the judgment was affirmed. One of the grounds of the appeal was that the testimony of the two witnesses was incompetent. As to this the court said: "We think both witnesses were competent, and that their testimony was properly admitted by the court. They were not offered as experts, but as ordinary witnesses, without having any special or peculiar knowledge which would especially fit them to testify to the speed of the machine. Their competency to express an opinion did not require them to possess technical or scientific knowledge. An intelligent person having a knowledge of time and distance is capable of forming an opinion as to the speed of a passing railroad train, a street car, or an automobile. His conclusion is the result of a comparison with the speed of other moving objects of which he has knowledge by constant experience. There is no more reason why such a witness should not be permitted to testify to the speed of an automobile than to the speed of a carriage or other vehicle which travels the public highways. His everyday experience gives him sufficient knowledge to form an intelligent judgment upon the subject. He simply compares the speed of one moving object with that of another with which he is made familiar by the daily affairs of life. Aside from any other sufficient reason, the necessity of the case requires that such testimony be admitted in trials involving the wanton and dangerous speeding of automobiles. To hold otherwise and to compel the production of expert testimony in such cases would in almost every instance defeat the ends of justice. An expert witness or exact measurement by a speedometer is seldom available to a party who has been injured by the reckless conduct of a person operating such a machine, and to require such evidence in order to sustain an action would be unreasonable and work palpable injustice. Absolute accuracy is not required in such cases to make a witness competent to testify to the speed of the machine. . . . The experience of nonexpert witnesses will enable them to form a reasonably accurate judgment as to the speed of a passing machine, and nothing beyond that is expected or should be required. Of course the value and the weight to be given such testimony by the jury will, as in similar cases, depend upon the attention the witness has given the subject and the opportunities for observation which he may have had. His inexperience in such matters, however, goes to the weight, and not to the admissibility, of his testimony. The witness is competent to express an opinion as to the speed of the machine; it is for the jury to determine what weight they will give his testimony."

New Books.

ACTIONS AT LAW RESPECTING TITLES TO LAND.

By Arthur Gray Powell, a judge of the Court of Appeals of Georgia. Pp. 753. Atlanta: The Harrison Company, 1911.

This volume purports to be a practical treatise on the law and procedure involved in the preparation and trial of cases of ejectment and other actions at law respecting titles to land, treating particularly of the pleading, practice, and evidence, and, in a general way, also of the principles of substantive law involved in such actions. The author is a judge of the Court of Appeals of Georgia, and the cases cited to sustain the author's text are Georgia cases. The author says in the preface that "while the book will be of some utility beyond the limits of this State [Georgia] in jurisdictions where the common law is the basis of the local jurisprudence, still the work has been undertaken with a view to the needs of the bench and bar of the State, and to them it is principally addressed." The author had a large practice in land cases before his elevation to the bench, and his grasp of the subject which he treats is seen from a perusal of his work. The large number of cases cited shows that the subject is a live one in Georgia and indicates that the volume at hand is needed.

THE LAWS OF ENGLAND. VOL. XV.

By the Right Honourable the Earl of Halsbury. Pp. clxxi+577+59. Rochester, N. Y.: Lawyers' Co-operative Publishing Company, 1911.

The fifteenth volume of this encyclopædic work which is intended to be a complete statement of the whole law of England has recently been published. The leading subjects treated are Food and Drugs; Fraudulent and Voidable Conveyances; Friendly Societies; Game; Gaming and Wagering; Gas; Gifts, and Guarantee. These subjects have been treated by well-known English lawyers, and the standard of former volumes has been maintained.

LEGAL DOCTRINE AND SOCIAL PROGRESS.

By Frank Parsons, Ph. D., member of the Massachusetts Bar. Pp. 7–219. New York: B. W. Huebsch, 1911.

The late Prof. Frank Parsons was not only a lawyer and legal teacher, but he was a student of social problems as well, and he frequently gave expression to his views through the magazines and on the lecture platform. Those views showed much originality and independent thinking, but he was an "insurgent" at a time when insurgency was not as popular as it is now, and thereby missed the applause which might greet him were he living to-day. The little volume before us is a fragmentary discussion of various legal and social reforms. It covers a pretty wide field, but is suggestive.

OBSCENE LITERATURE AND CONSTITUTIONAL LAW.

By Theodore Schroeder, legal counselor to the Medico-Legal Society of New York. Pp. 439. New York: 1911.

This book is said by the author to be a hasty compilation of essays which have already appeared in print in the periodical press. It is a plea for the freedom of the press especially with respect to serious discussions of sex. In fact a considerable part

of the book is concerned with things sexual, and while much seems to be unnecessary to support his argument for the freedom of the press in this particular, it all shows research and presents an interesting study of the psychology of sex and sex relations. We quite agree with the author that more freedom to write about the subject of sex from a scientific and educational standpoint should be permitted, and we are not in sympathy with much that has been done in the way of suppressing books of real merit on that subject, though perhaps he would have us go too far. On the freedom of the press in general the author has something to say, and the book contains the constitutional provisions of the different States with authorities construing them. Its chief value, however, consists in its treatment of the sex question, and if it does not fall into the hands of Mr. Anthony Comstock it may do some good.

News of the Profession.

THE RHODE ISLAND BAR ASSOCIATION held its annual clambake and outing at Pomham on May 26.

JUSTICE JOHN MARSHALL HARLAN of the United States Supreme Court celebrated his 78th birthday anniversary on June 1.

THE PENNSYLVANIA STATE BAR ASSOCIATION held its seventeenth annual meeting at Bedford Springs on June 27, 28, and 29. Full particulars will be given in our next issue.

THE INDIANA STATE BAR ASSOCIATION will hold its annual session at Winona Lake on July 11 and 12. The annual address will be delivered by Peter W. Meldrim, of Savannah, Ga.

ILLINOIS STATE BAR ASSOCIATION. — Further particulars respecting the meeting of the Illinois State Bar Association at Champaign on June 22 and 23 will be given in the next issue of LAW NOTES.

PRESIDENT HARRY BURNS HUTCHINS, of the University of Michigan, will deliver the annual address before the Kansas State Bar Association at its next annual meeting Jan. 30, 1912.

KENTUCKY STATE BAR ASSOCIATION. — The dates for the annual meeting of the Kentucky Bar Association have been announced. The sessions will be held at Lexington on July 12 and 13.

APPOINTMENT TO NEW YORK SUPREME COURT BENCH. — Daniel F. Cohalan, of New York city, has been appointed by Governor Dix a justice of the Supreme Court of New York to fill the vacancy caused by the resignation of United States Senator O'Gorman.

A COMMITTEE OF THE UNITED STATES SUPREME COURT, composed of Chief Justice White and Associate Justices Lurton and Van Devanter, has been appointed to prepare a new set of rules that will revise the practice in equity cases in the federal courts.

NEW LAW SCHOOL PRESIDENT. — Prof. Charles Noble Gregory, formerly of the University of Wisconsin and late dean of the law department of the University of Iowa, has accepted the offer made to him by the trustees of George Washington University to head the law department of that institution.

UNITED STATES RULED BY LAWYERS. — The government of the United States is apparently in the hands of the lawyers. Of the 480 members of Congress, both Senate and House, 304 are lawyers. The judicial branch of the government is, of course, given over entirely to lawyers. And of the executive branch, President Taft is a lawyer, and seven out of nine members of the cabinet have had a legal training.

NEW JERSEY STATE BAR ASSOCIATION. — The annual meeting of the New Jersey State Bar Association was held in Atlantic City on June 16 and 17. The gathering was presided over by former Judge Howard Carrow, president of the association. Governor Woodrow Wilson delivered an address at the dinner the first evening, and James Pennewill, Chief Justice of the Supreme Court of Delaware, spoke at the meeting the following morning.

CHANGES IN LAW SCHOOL FACULTIES. — Harold Bowman, formerly of Des Moines, Ia., but for the past few years an editorial writer on the *New York Globe*, has accepted a position as instructor of law in the Boston School of Law. George B. Eager, Jr., of Louisville, Ky., who, in addition to being an authority on legal matters, holds the tennis championship for the State of Kentucky, has been made a member of the law faculty of the University of Virginia.

WOMEN WIN LAW HONORS. — For the first time in the history of the Albany Law School a woman has carried off the highest honors of commencement. Miss Hazel M. Cole, of Springfield, Mass., has been awarded the Josiah H. Benton prize for excelling in class standing, and the White prize for the second best examination on corporation law. In connection with the foregoing item it may be mentioned that at the recent commencement exercises of the Chicago-Kent College of Law, three young women were awarded the degree of Master of Laws.

MONUMENTS TO WISCONSIN JUDGES. — The Wisconsin Bar Association's tribute to the memory of Luther Swift Dixon, chief justice of the State Supreme Court from 1859 to 1874, an imposing granite shaft, fifty feet high, erected on his grave at Madison, Wis., was formally dedicated on June 1. Justice R. J. Marshall, of the Supreme Court, speaking for the Bar Association, presented the monument to the State, and Chief Justice John B. Winslow made the address of acceptance. A similar monument was dedicated on June 2, at Milwaukee, to the memory of Chief Justice E. G. Ryan.

THE COMMITTEE ON COMMERCIAL LAW of the American Bar Association held a public meeting in Cincinnati, O., on May 29. Consideration was given to suggestions looking to the improvement of the National Bankruptcy Act, federal legislation on the subject of bills of lading used in interstate and foreign commerce, and the wisdom of the enactment of a federal commercial code. Uniformity of State laws governing the uses of commercial paper was also a topic of discussion. The report of the committee will be acted on at the next convention of the American Bar Association, which will be held in Boston on August 29.

PROF. WOOLSEY LEAVES YALE. — Prof. Theodore Salisbury Woolsey, LL. D., professor of international law in the Yale Law School, has handed in his resignation to take effect at the close of the present college year. Professor Woolsey has occupied the chair of international law at Yale for thirty-three years. He is the son of the late President Theodore Dwight Woolsey and was born in 1852. He was graduated from Yale in 1872, from the Law School in 1876, and took a Yale M. A. in 1877. In 1903 he was given an LL. D. degree by Brown University. He is a recognized authority on international law and has written extensively on the subject.

ARKANSAS STATE BAR ASSOCIATION. — The two days' session of the annual convention of the Arkansas State Bar Association held at Hot Springs came to a close on May 31st with a banquet. The convention was opened with an address by President W. Lee Thompson, of Prescott. Papers were read by Judge U. M. Rose, of Little Rock, and Joseph W. House, of Little Rock. The election of officers for the ensuing year resulted as follows: President, Ashley Cockrill, of Little Rock; vice-president, James D. Shaver, of Mena; treasurer, J. Merrick Moore; secretary,

R. R. Lynn, of Little Rock; Executive Committee — Chas. T. Coleman, of Little Rock, chairman; J. W. Blackwell of Little Rock, Will Steel of Texarkana, George B. Pugh of Little Rock, and S. B. Campbell of Newport.

QUEBEC'S NEW LIEUTENANT-GOVERNOR. — Sir François Langelier, chief justice of the Superior Court of Quebec, who has been appointed lieutenant-governor of the province, in succession to the late Sir C. A. P. Pelletier, early won a name in his native province as a lawyer. After a brilliant career at Laval he was called to the bar in 1861, and became professor of Roman law and later of civil law and political economy at Laval. He was created a Q. C. in 1878. He was elected to the Quebec legislature for Montmagny in 1873 and for Portneuf in 1878. He has also represented Megantic and Quebec Centre in the House of Commons. He was a member of the Joly Cabinet of Quebec. His appointment as chief justice of the Superior Court of Quebec dates from 1907, and he resigned his seat for Quebec Centre to accept the office. He was created Knight Bachelor in June, 1907.

IOWA STATE BAR ASSOCIATION. — The programme prepared for the annual convention of the Iowa State Bar Association, held at Oskaloosa on June 29 and 30, was as follows: Address of welcome, Hon. John F. Lacey, Oskaloosa, Iowa; response to address of welcome, Hon. C. A. Carpenter, Columbus Junction, Iowa; paper, "The Lawyer as a Patriot," Hon. John C. Sherwin, justice of Iowa Supreme Court, Mason City, Iowa; president's address, "John Marshall," J. L. Carney, president Iowa State Bar Association, Marshalltown, Iowa; paper, "Particularist Society," Hon. F. F. Dawley, Cedar Rapids, Iowa; paper, "The Law," Hon. W. R. Lewis, Montezuma, Iowa; paper, "A Practical Legal Education," Prof. Ralph Otto, member of law school faculty, Iowa State University, Iowa City, Iowa; annual address, "Employers' Liability and Workingman's Compensation Acts," Hon. John Burke, governor of North Dakota.

GEORGIA STATE BAR ASSOCIATION. — The twenty-eighth annual convention of the Georgia Bar Association was held at Brunswick on June 1 and 2. The annual address was delivered by President Joel Branham, of Rome. An interesting paper on the famous Myra-Clark case was read by J. Carroll Payne, of Atlanta, and a scholarly address on the tendency of the courts to condemn private property for public use was delivered by Hon. W. A. Blount, of Pensacola, Fla., president of the Florida Bar Association. J. C. C. Black, of Augusta, read a paper containing many decisions of the Supreme Court years ago and some extracts from letters of Judge Choate, of Massachusetts, written in 1853. A resolution was unanimously adopted expressing the satisfaction of the association at the elevation of Judge Joseph R. Lamar to the bench of the Supreme Court of the United States. The election of officers resulted as follows: President, Alex W. Smith, of Atlanta; first vice-president, W. C. Bunn, of Cedartown; second vice-president, J. R. L. Smith, Macon; third vice-president, R. D. Meador, Brunswick; fourth vice-president, T. J. Brown, Elberton; secretary, O. A. Park, Macon; treasurer, Z. D. Harrison, Atlanta; Executive Committee — W. W. Gordon, Jr., Savannah; I. J. Hoffmayer, Albany; W. H. Barrett, Augusta; H. C. Peeples, Atlanta.

TENNESSEE STATE BAR ASSOCIATION. — The thirtieth annual session of the Tennessee Bar Association was held at Nashville on May 24, 25, and 26. Addresses of welcome were delivered by G. N. Tillman for the State and by Judge John Allison for the lawyers of Nashville. The president's address, by Percy Maddin, of Nashville, reviewed state and national legislation, making valuable suggestions concerning the future course of the association in widening its usefulness by guiding legislative enactments. Papers were read as follows: "The Future of Jurisprudence in the United States," by Frederick N. Judson, of St. Louis, Mo.; "Needed Constitutional Amendments," by Judge D. L. Lansden, of Nashville; "Some Lawyers of East Tennessee Who Are Being Forgotten," by Col. W. A. Henderson, of Knoxville; and "Penal Reform," by Hon. James M. Malone, of Memphis. The meeting closed with a banquet at which ex-Secretary of War Dickinson was the guest of honor. Col. Dickinson responded to the toast, "Shall Representative Government Be Abandoned?" The following officers were elected for the ensuing year: President, L. D. Smith, Knoxville; vice-presidents, R. F. Spraggins, Jackson; Geo. T. Hughes, Columbia; Chas. R. Evans, Chattanooga; secretary and treasurer, Charles H. Smith, Knoxville.

LOUISIANA STATE BAR ASSOCIATION. — The annual meeting of the Louisiana Bar Association convened at Lake Charles on June 2d, the president, E. A. Randolph, of Shreveport, in the chair. Addresses of welcome were delivered by city attorney D. F. Gayl on behalf of the city, and U. A. Bell representing the local bar. A fitting response was made by E. T. Weeks, of New Iberia. Addresses on legal topics were delivered by Prof. R. L. Tullis, of the Louisiana State University, and Prof. W. O. McGovney, of Tulane Law School. A considerable portion of the annual address of the president was given to a discussion of the referendum and recall. He assailed these doctrines as being dangerous and pernicious, and sounded a vigorous warning against any thought of adopting such principles in Louisiana. Hon. Henry Dart, of New Orleans, delivered an interesting talk on "Sources of the Civil Code of Louisiana." Hon. Rufus E. Foster, judge of the United States District Court for the Eastern District of Louisiana, spoke in place of Martin W. Littleton, his subject being "The Federal Judiciary." The following officers were elected for the ensuing year: President, Joseph W. Carroll, New Orleans; vice-presidents, B. W. Kernan, New Orleans; C. A. McCoy, Lake Charles; Judge A. A. Gumby, Monroe; E. T. Weeks, New Iberia; secretary and treasurer, Charles A. Duchamp, New Orleans.

JUDGE SCHOFIELD APPOINTED TO FEDERAL BENCH. — President Taft has appointed Judge William Schofield of Malden, Mass., to the United States Circuit Court bench, to fill the vacancy caused by the death of Judge Lowell. Judge Schofield has long been regarded as one of Boston's ablest lawyers. He was born at Dudley, Mass., Feb. 14, 1857, was graduated from Harvard University in 1879, and from the Harvard University Law School in 1883. From 1883 to 1885 Mr. Schofield was private secretary to Chief Justice Gray of the United States Supreme Court. He was instructor in torts at the Harvard Law School from 1886 to 1890 inclusive, and in Roman law at Harvard College from 1888 to 1892. He was elected to the House of Representatives from Malden, his home city, in 1898, and served four years there. He was a member of the committee on metropolitan affairs during his whole service in the House, and was chairman of that committee two years. As a member of the public service committee during his last year in the House he had much to do with reform suggestions by Gov. Crane, and it was his excellent work in the House, especially along lines advocated by Gov. Crane, that moved that executive to appoint him to the superior bench in December, 1902. Mr. Schofield succeeded Judge Henry K. Braley, who went from the superior bench to the Supreme Court of the commonwealth. While in the legislature Judge Schofield won a wide reputation as an eloquent orator, a resourceful debater, a quick thinker, and an adversary who always commanded the respect of his opponents. His vigorous personality soon made him the Republican leader of the House, and his influence was marked in the legislation upon nearly all the most prominent measures considered by the legislature during his term of service in the House.

English Notes.

CELEBRATED HIS HUNDREDTH BIRTHDAY. — A. Gordon Hake, the dean of the London bar, celebrated his one hundredth birthday recently at his home at Brighton. Mr. Hake is a master of five languages — Greek, Latin, French, Italian, and Spanish, and reads Horace, Virgil, and Montaigne. He attributes his long and healthy life to plenty of riding — he had for years a favorite horse named Daisy — and to walking and to abstemious living. He has never cared much for modern varieties of dress. The Rev. T. G. Hake tells a good story of his father's rough-and-ready toilet. Dr. Charles Hanson once called on him at his chambers and asked permission to put on his barrister's wig and gown. "Now," he said, "lend me a looking glass." He was handed a razor — the nearest approach to a mirror possessed by his friend.

COPYRIGHT IN EIGHTEENTH CENTURY. — One can find cases in the law reports of the eighteenth century which suggest that the proposed extension of the period of copyright is only a return to an earlier state of things. In 1739, for instance, Lord Hardwicke granted an injunction against the publication of an edition of "Paradise Lost," on the application of those who had bought the copyright from Milton some seventy years before, and the issue of an edition of the "Whole Duty of Man" was forbidden by the courts seventy-eight years after the book's first publication. — *London Chronicle.*

THE UNIVERSAL RACES CONGRESS. — The Universal Races Congress which will meet in July in the premises of London University will discuss some problems of international relationship, and out of these conferences it is not difficult to foresee some results of a far-reaching character. The attitude of mind of "white" to "colored" nationalities, which has so long been marked by a certain admixture of contempt, can no longer be sustained in view of the changes in processes of thought and action now developing to the knowledge of men engaged in the conduct of public affairs. To-day it is common knowledge that conferences of this description are no mere talking campaigns, but that the discussions soon transform themselves into organized demands for legislation of one kind or another. The claims of "solidarity of nations" are now no mere verbal expressions — they have become real live issues; and in such legislation as that which governs the relationship of France and England in the matter of workmen's compensation it is actively in existence. Lord Weardale's paper now being circulated in England by the American Association for International Conciliation shows that the congress of July is one worthy of the consideration of the legal profession.

DEATH OF SIR WILLIAM GILBERT. — Sir William Schwenck Gilbert, barrister-at-law, poet and dramatic author, died suddenly on May 29, of a heart affection while bathing at his home at Harrow Weald. Sir William Gilbert was born at 17 Southampton street, Strand, on the 18th November, 1836. On his mother's side he was Scotch; his father was descended from one of the Devon Gilberts, who married a sister of Sir Walter Raleigh. At the age of seven he went to school at Boulogne; from ten to thirteen he was a pupil at the Western Grammar School, Brompton, and from thirteen to sixteen at the Great Ealing School, where he took prizes in English, Greek, and Latin verse, spent much time in drawing, though without lessons, and wrote a number of plays for performance by his schoolfellows, painting his own scenery and taking a part himself. He took his B. A. degree at London, and was called by the Inner Temple in 1863 and joined the Northern Circuit. His dramatic work is too well known to require mentioning here. He married Lucy Agnes, daughter of Captain Turner, who survives him. At the inquest it transpired that Sir William Gilbert was attempting to assist a young girl, who was out of her depth, when the heart failure occurred. The coroner said, "I think it is a very honorable end to a great and distinguished career."

POSTCARDS AS "COMMODITIES." — A curious divergence of magisterial opinion has come to light in the course of various summonses charging hawkers with selling picture postcards in the London parks, proceedings alleged to be in contravention of the regulations which prohibit the sale of any "commodity" therein. Some time ago it was held that a picture postcard was not a "commodity," and in consequence some encouragement was given to persistent annoyance in a shape not far removed from begging. Mr. Curtis Bennett has set his face against this, and holds that the word "commodity" covers the postcard. The point is not, perhaps, quite so clear as it may be thought at first sight, and the dictionary definitions somewhat vary, for the word is one which has somewhat modified its meaning. Its probable significance many years ago would have been something appertaining to a convenience. Thus, Ben Jonson speaks of "the commodity of a footpath;" but amongst a large variety of definitions in the new Oxford Dictionary are found the following: "A kind of thing produced for use or sale; an article of commerce; an object of trade." In its plural form the word gets a still wider significance, for it imports "goods, merchandise, wares, produce." Coming to less concrete things, such as share certificates, the matter is still more difficult; but *Re* Cleland, 36 L. J. 33, Bank., shows that the phrase "goods or commodities" would not apply to shares in companies so as to make a man a trader for the purposes of the Bankruptcy Act 1849, § 65.

THE CROWN'S VETO. — The reference to the veto of the Crown has been so frequent of late in discussions relating to the retention or the abolition of the veto of the House of Lords in legislation that a long-forgotten ceremonial associated with the withholding by the sovereign of the royal assent to a bill which has been passed through both Houses of Parliament may be brought to recollection. Lord Mountmorres, in his history of the Irish Parliament, which was published in 1792, commenting on the veto of the Crown on the legislation of the Irish Parliament since the establishment in Ireland of parliamentary independence in 1782, says: "Of the rejection of bills, it is said there are very few instances of such a refusal by the Crown since 1782, though doubtless the royal negative in both kingdoms (Great Britain and Ireland) is as clear a privilege as any other prerogative. It was ably urged by Mr. Flood, one of the most eloquent and able members that Ireland has ever known, that the royal negative to an Irish bill should be given in the House of Lords publicly by the Lord-Lieutenant, but this proposition was rejected. The royal negative of '*le roi s'avisera,*' I was informed by an officer of the House of Lords in England remarkable for his knowledge of forms, is accompanied with holding the bill down and putting it under the table, a motion the reverse of that which takes place upon giving the royal assent." Mountmorres' Irish Parliament, i. pp. 60, 61.

QUAINT METHODS OF ADMINISTERING OATHS. — A picture representing Charles King, a Chinese boarding-house keeper, taking the oath at the Poplar Coroner's Court during the East End murder case, in which the witness is depicted blowing out a candle to signify that if he lies his soul will be blown out with the flame, recalls some of the quaint ceremonials attending the taking of oaths recorded in the books. A Chinaman has been thus sworn in R. *v.* Entrehman, 1 Car. & M., 248. On entering the box the witness immediately knelt down, and a china saucer having been placed in his hand, he broke it. The officer of the court, through an interpreter, then addressed him thus: "You shall tell the truth and the whole truth, and if

you do not tell the truth your soul will be cracked like the saucer." The form of swearing a Mahometan in R. *v.* Morgan, 1 Leach C. C. 54, was as follows: The witness first placed his right hand on the Koran, put the other hand to his forehead, and brought the top of his forehead down to the book and touched it with his head. He then looked for some time upon it, and, being asked what effect that ceremony was to produce, he answered that he was bound by it to speak the truth. The deposition of a Gentoo, Omichund *v.* Barker, 1 Atk. 21, has been received who touched with his hand the foot of a Brahmin. Buddhists have been sworn by "the three holy existences — Buddha, Dhamma, and Pro Sangha — and the devotees of the twenty-two firmaments," and a Parsee on the Zend-Avesta, or by binding a "holy cord" round his body. See Roscoe's Nisi Prius (17th ed) 161, 162.

COMMENT ON STANDARD OIL COMPANY DECISION. — Nearly eighteen months ago judgment was delivered in the Missouri courts prohibiting the Standard Oil Company and some of its subsidiary companies from continuing an illegal combination in restraint of trade contrary to the Sherman Anti-trust Law of 1890. Under that act all contracts and combinations in restraint of trade are made illegal, and anybody who monopolizes or attempts to monopolize any industry is declared guilty of a misdemeanor. The Supreme Court of the United States has now, with one dissentient, upheld the decision of the court below, and has declared the operations of the Standard Oil Company and its subsidiary companies to be a violation of the statute. From the reports published in this country at present of the decision of the Supreme Court it would seem that the present judgments of that tribunal do not go as far as some of their rulings in the past, where it had been laid down that the law of 1890 covered every contract or combination in restraint of trade. The present decision, however, seems to show that whether or not any contract or combination is within the purview of the prohibition created by the statute must depend upon its reasonableness. Whether or not this decision will have any wide practical effect, so far as the huge trust created by the Standard Oil Company is concerned, may be open to considerable doubt. Since 1865 the heads of this combination have set to work slowly, but surely, to acquire this oil monopoly. How many subordinate companies are under the control of the parent company incorporated in New Jersey it is difficult to say, but it is clear that the combination thus existing is practically unique, and its operations and power of control exist throughout the civilized world. No doubt the government of the United States, fortified by the present decision of the Supreme Court, will be able to prevent any open violation of the Anti-trust Law; but, as the *Times* points out, "every country has tried its hand at putting down monopolies and maintaining or restoring competition, and generally with indifferent success;" or, as another of our contemporaries has tersely stated the point, the State can put down monopolies, but it cannot compel competition. It will be interesting to see in the future the ultimate result of this decision of the Supreme Court.

"IT is not every error in the trial of a cause, and especially in the trial of a cause before the court, that justifies or requires a reversal of the judgment rendered thereon. The question is always as to the magnitude of the error." *Per* Cullen, C. J., in Viele *v.* McLean, 200 N. Y. 260, 93 N. E. Rep. 468, *reversing* 128 App. Div. 910, 112 N. Y. Supp. 1149, which was a trial by the court, because of a plain error in receiving objectionable evidence, the effect being necessarily injurious because its reception must have proceeded on the belief by the trial judge that it was entitled to probative weight as an admission of the defendant against whom judgment was rendered.

Obiter Dicta.

GOING SOME! — Breeze *v.* Sails, 23 U. C. R. 94.

TWO GRUMBLERS. — "MacMahon, J.: I give a grumbling assent. Teetzel, J.: I agree." See McKeown *v.* Toronto R. W. Co., 19 Ontario Law Rep. 361, 369.

A CAUTIOUS STATEMENT. — "Generally speaking, the contingency, so far as contingency is concerned, in life insurance, is death." Mutual Life Ins. Co. *v.* Smith, 184 Fed. Rep. 3.

NOT SO VERY. — "It may, no doubt, be said that the analogy between a gas company and an incorporated law society is very remote, but I think," etc. *Per* Hunter, C. J., in Calder *v.* Law Society, 9 Brit. Col. 56, 59.

GOOD LIQUOR. — In White *v.* State, (Neb. 1911) 129 S. W. Rep. 259, a druggist was convicted of selling a beverage labeled "Queen Bee." One of the witnesses for the prosecution testified that it was certainly a "spiritual liquor."

WHOSE WIFE? — "In my opinion the lawyer who will coolly offer to his client to take his wife on a visit . . . should be excluded from practice in the courts." *Per* Mr. Justice Miller in *Ex parte* Cole, 1 McCrary (U. S.) 405, 414.

EVIDENCE OF INSANITY. — "Under such circumstances, Mrs. Moore's custom of keeping a dog in the house and of spitting on the floor cannot be regarded as furnishing much evidence of any loss of mental power." Ames *v.* Moore, 53 Ore. 274.

SURE! — "If the evidence presented to the judge is *satisfactory,* as the rules require it to be, then of course the judge must be *satisfied;* and *vice versa,* if the judge is not *satisfied,* then it follows that the evidence is not *satisfactory.*" *Per* Taylor, C. J., in State *ex rel. v.* Hooker, 39 Fla. 477, 488.

A TRANSIENT LAWYER. — From Okemah, Okla., comes this letterhead:

SHERMAN PLATER
LAWYER, ORATOR AND AUCTIONEER.
COLLECTIONS
Formerly of the Washington State Bar.

ATTORNEY IN A "VICIOUS CIRCLE." — "He was crowding the calendar with vast numbers of libel suits, in his own favor, and in the habit of instituting additional libel suits upon the answers to those previously brought by him. In one instance, at least, he had sued his client in a justice's court, and when beaten upon trial, instead of appealing from the judgment, he commenced numerous other suits against him, in different towns, for the same cause, when he must have known that the demand was based on the first judgment rendered." Extract from opinion of Grover, J., in Percy's Case, 36 N. Y. 351, a disbarment proceeding.

WOULDN'T TAKE ANY. — The late Lord Young of the Scottish bench was responsible for enlivening many a dull case. One of the best remarks that ever fell from his lips was the reply to a counsel who urged on behalf of a plaintiff of somewhat bibulous appearance.

"My client, my lord, is a most remarkable man, and holds a very responsible position; he is manager of some waterworks."

After a long look the judge answered:

"Yes, he looks like a man who could be trusted with any amount of water." — M. A. P.

WORDS FAILED HIM. — Hinman *v.* Hare, 5 N. Y. St. Rep. 504, was an action for libel in which the plaintiff, a clergyman, recovered against the defendant, his bishop, a verdict of $10,000. The cause of the libel was a letter written by the plaintiff, afterwards printed in pamphlet form, wherein the plaintiff accused the defendant of taking every occasion to insult and

humble him. Plaintiff closed the letter by criticising the conduct of the bishop as "unlawful, insincere, unfair, unjust, uncanonical, cowardly, unmanly, dishonest, outrageous, remarkable, shameful, passionate, subtle, unscriptural, indefensible, monstrous, unrighteous, high-handed, atrocious, heartless, and cruel." The only apparent reason why the plaintiff ever did conclude his pamphlet must be that there are no more adjectives in the English language. And who can blame the bishop for hitting back?

A RIDDLE AND ITS ANSWER. — In Rex *v.* Coote (1910), 22 Ontario Law Rep. 275, Meredith, J., said: "It is very easy to say that the special provisions of one enactment shall prevail against the mere general provisions of another enactment; just as it is easy to say two and two make four, . . . and the one proposition may be just as helpful as the other in the consideration of such a case as this." It would be necessary, he continued, that the court shall first find one provision in conflict with another, and then to find which is special and which is general, and not take all those things for granted, and he also mentioned "another and more important rule of construction." Why then did the judge so boldly assimilate the legal proposition to the proposition, apparently an *absolute* verity, that two and two make four? Without requiring the reader to wait for an "answer in our next," we give the solution of the puzzle: "In truth they may sometimes make twenty-two."

AN ODORIFEROUS BANKRUPT! — In People *v.* Gregory, (Cal.) 97 Pac. Rep. 912, which was a prosecution for lewd and lascivious conduct, the trial court refused to order the courtroom cleared during the giving of testimony, but remarked that no right-minded person would wish to hear the evidence, whereupon the entire audience left the room. The defendant took an exception to the judge's remark, and, speaking to this point, Hart, J., of the Appellate Court, said: "It is very plain that an order excluding spectators was not made by the court, and that, if the defendant was deprived of the high constitutional privilege of having the public listen to the witnesses detail facts and circumstances tending to prove against him the commission of acts, the offensive and noxious odors from which would drive a polecat into bankruptcy, it is due less to the remarks of the court than to the commendable sense of decency with which the citizens of Red Bluff comported themselves with reference to the trial."

WHOSE HOG? — The following is a true copy of a warrant issued by a Tennessee justice of the peace:

STATE OF TENNESSEE }
BLANK COUNTY. }

To any lawful officer of said county — to execute and return:

Whereas E. F. Thompson having given information on oath to me that Wm. J. Kirkland & Jesse Graves on the 22 day of November, 1910, in said county, did unlawfully kill one of my hog and skind it and conceiled the meat in the house and hid the hide in a hollow stump which I found and got the ears.

I therefore, command you, in the name of the State to take the bodys of said Wm. J. Kirkland & Jesse Graves and bring them forthwith before me, or some other Justice of said county, to answer the said charge and be dealt with as the law directs.

Given under my hand and seal this 22 day of November, 1910.

JOHN BLANK,
Justice of the peace for said county.

THE JURY WERE NOT MOVED. — An accused person was on trial in the Second Criminal Court of Memphis charged with the offense of fraudulent breach of trust. The prosecution contended that the defendant had feloniously converted to his own use a certain sum of money in his possession, without the consent of the prosecutor. The defense maintained that the prosecutor had simply loaned the money to the defendant and that if there was any liability at all it was simply a civil liability. The defendant was represented by an attorney of pure African descent, who, on account of a certain impediment in his speech, was commonly known as "Spluttering Johnson." In the course of his address to the jury "Spluttering Johnson" urged the following as a conclusive reason why his client should not be convicted: "Gentlemen of the Jury; this is nothing but a debt. You can't imprison a man for debt in this country. The highest law in the land says you can't imprison. What law am I talking about, gentlemen? Ah! I am referring to that old, sacred document, the 'Constipation of the United States.'" Whereupon the jury gave Johnson's client three years in the State penitentiary.

A LETTER-HEAD AND A COMMA. — We do not often cull letter-heads from the law reports, but the one which we print below was responsible for raising an interesting question in the case of Commonwealth *v.* Grant, 201 Mass. 458. A criminal complaint was laid against the defendant charging that he, without having been admitted to practice as an attorney at law, had represented himself, by means of a certain letter-head, to be an attorney and counselor at law and duly qualified to practice in the courts of Massachusetts. This is the letter-head in question:

"Law, Collections & Adjustments.

Claims collected by Suit or Demand Everywhere. Special Attention Given to Accident Claims and all Other Causes for Civil Damages.

A Lawyer Retained in every City and Town in the United States and Canada to Prosecute and Adjust Claims in and out of Court.

G. OSBORNE-GRANT, L. L. B.

LATE FIRST ASSISTANT ATTORNEY IN THE OFFICE OF

The Hon. Judge Harvey D. Hadlock,

ATTORNEY AND COUNSELLOR AT LAW,

BOSTON, U. S. A.

Formerly Attorney General-elect of the Principality of Trinidad, South America. Under Baron Harden-Hickey, the Founder of the Principality.

Legal Counsel in the United States for the Guianese Junta.

Cable Address: "Guiana, Boston"

Codes: Watkin's Code. A. B. C. Code 4th & 5th Edition. Lieber's Code. Western Union Code A1 Code.

Telephone Connection."

The main issue was with respect to the words "Attorney and Counsellor at Law" in the middle column. The defendant contended that the words referred to Judge Hadlock, and that on the letter-heads actually used by him there was no comma after the name Hadlock. Neither the court nor the jury, however, was impressed by that argument, and they found that the whole scope and purpose of the letter-head was to advertise the defendant as an attorney. The defendant was convicted, and on appeal the conviction was sustained, the court declaring that the presence or absence of a comma at the point indicated was of little significance.

SPEER ON DOMESTIC RELATIONS. — In Dunbar *v.* Charleston, etc., R. Co., 186 Fed. Rep. 175, a case decided in the United States Circuit Court for the Southern District of Georgia, the plaintiff sued for damages for the wrongful death of her husband. The defendant's counsel offered to prove that the wife, at the time of her husband's death, was temporarily separated from him. This was objected to, and in passing upon the objection, Judge Speer delivered the following beautiful and exhaustive treatise on the subject of domestic relations: "This question goes pretty far into the subject of domestic relations. Now that is a subject which in its comprehensiveness and intricacies is not surpassed by any other. If the courts, in estimating the value of the husband's life to the wife, should permit counsel to inquire into the degree of affection or intimacy existing between them, such are the complexities of connubial existence, it would probably be true that we could never come to the end of such a case. Of course it is suspected (perhaps by the uninformed) that husbands and wives have occasionally what are sometimes called 'tiffs.' Sometimes they separate; but if they are separated only in one of these

'tiffs,' it is usually only an elongation of the 'tiff.' *Varium et mutabile semper fœmina.* A liberal translation may be found in the familiar verse:

'O woman, in our hours of ease,
Uncertain, coy, and hard to please;
When pain and anguish rend the brow,
A ministering angel thou.'

It may be, then, that this wife, though for the time 'out with' her Simon, if she had heard he was in trouble, would have flown to become his ministering angel. Separations of this sort do not amount to much. The law gives the parties the *locus pœnitentiæ;* that is (again translating liberally), the opportunity of getting together again. The unhappy pair will be presumed to live in the relationship of husband and wife until they have been separated in the manner pointed out by law. This is by a decree of divorce *a mensa et thoro,* that is (translating strictly), 'from bed and board,' or *a vinculo matrimonii* (translating liberally), from the sacred bonds of matrimony. I do not think, therefore, it is safe or justifiable at all in an inquiry of this sort to inquire into the degree of felicity or infelicity which existed between the husband and wife."

A WILLING WITNESS. — A correspondent sends us a transcript of the testimony given by a negro in an election contest in Mississippi county, Arkansas, about a year ago. As our correspondent was the cross-examiner he is able to vouch for the truth of the following:

Direct Examination.

Q. How long before the election was it that Mr. Bomar, who had charge of the convict farm at Wilson, came into the quarters where the convicts were and flourished a big whip and stated that any of the convicts who failed to vote for S. L. Gladish for county and probate judge would at least be given ten lashes well laid on?

A. It was the night before.

Cross-examination.

Q. You say that the night before the election Mr. Bomar came in where you all were, with a pistol in his right hand and a bull whip in his left hand, and flourished it up in the air this way, and said you ——— ——— ———, who don't vote like I tell you, I will give him ten lashes, and then if that don't satisfy him, I will use this pistol on him?

A. Yes, sir.

Q. And at the same time he had a navy-six pistol sticking out of each boot top, didn't he?

A. Yes, sir.

Q. At the same time he unbuttoned his overcoat and pulled both sides of it back this way and showed you that he had in each inside pocket a six-shooter?

A. Yes, sir.

Q. He also showed you that he had strapped around his shoulder hanging down by his side a bag or hunting sack, and he had sticking out of the top of it three or four big pistols — you remember that, don't you?

A. Yes, sir; I remember it.

Q. You also remember, don't you, at the same time he did that he had buckled around his waist a strap and two big swords hanging down by the side of him; you remember that, don't you?

A. No, sir.

Q. You remember, don't you, when Mr. Bomar came in with these pistols that he swallowed a box of tacks and commenced cussing?

A. Yes, sir.

Re-direct Examination.

Q. Did you mean to say, in reply to Mr. C———'s interrogatory, that Mr. Bomar, in addition to flourishing a big whip and making an exhibition of all these pistols, accompanied by a war-whoop, threatening to shoot and kill, and after a display of which to give you an idea of his ferocity, that he swallowed a box of tacks?

A. I didn't mean that I saw him do it.

Q. State whether or not it is Mr. Bomar's habit of carrying his whip and pistols buckled on him around the convict farm?

A. Yes, sir.

Q. Did you mean to be understood when Mr. C——— asked you that just before the election Mr. Bomar showed you that he had strapped around his shoulders hanging down by his side a bag or hunting sack and that he had three or four big pistols sticking out of that?

A. No, sir.

Correspondence.

PROBABILITIES AND IMPROBABILITIES.

To the Editor of LAW NOTES.

SIR: There was once a young man who was so brilliant that his preceptors were trying hard to overlook his fundamental weakness in Bible history on "finals" — at Princeton, let us say — and so they agreed that if he would answer one question with unqualified correctness they would pass him; the question propounded was, "Who was the first king of Israel?" The answer was prompt and correct — "Saul!" The obvious thing was to hustle him out of the room. But in the hall it smote upon his conscience, "Here, I didn't tell them all I know on that point!" So he stuck his head back in the doorway and sung out to the astounded examiners, "Afterwards called Paul!"

Now I was greatly interested in the reference to the testimony of Professor Peirce in the Howland will case, and in the statement of the infinitesimal chance of two genuine signatures tracking, if I may use the technical term; but when you stuck your head in at the door by way of parenthesis to commit that fine mathematician to the proposition that the thirtieth power of five was "2600 followed by eighteen ciphers!" well, I scratched my head and like Sairey Gamp and Mrs. Harris, I didn't believe there "was any sich a person." But as I knew Professor Peirce, I changed that to doubting that he ever gave any such evidence, and to that I stick. Any power of five ends in five; any power after the first ends in 25; and the third figure is always either 1 or 6. None of them has two ciphers consecutively; and only two of the first fifteen have a cipher at all. The jury would have been warranted in disregarding his testimony if he had made any such statement. I call you!

But laying aside pleasantry, I do not believe it is a subject to which the mathematical theory of probability can be applied, further than to say that the chance of tracking is remote; this because accurate deduction by means of the theory depends upon premises to which exception cannot be taken, and there can be no agreement upon them in the case of a disputed signature. The number of variables is always more than five, for example; but the chance of any one of them varying is not predictable at all, and differs in each case, and as to every one of the variables of each signature; again differing with the personal and pen habits of each signer; and when we extend the inquiry to the personality of the forger, it becomes only a maze of speculation, perfectly worthless as a basis of decision. Much that is wonderful is done by experts; but nothing so wonderful as their testimony.

I have never been able to get the text of Professor Peirce's testimony in the Howland case; I would like to know upon what basis of incontrovertible fact he founds his series. I can see no firm foundation from which to start.

T. J. JOHNSTON.

NEW YORK.

THE UNWRITTEN LAW OF SINGLE BLESSEDNESS.

To the Editor of LAW NOTES:

SIR: In the May issue of LAW NOTES I read the report that several members of the bar were convicted of neogamy. Will you kindly inform me under what law or decision such convictions were obtained and sustained, and oblige

EDWARD H. BURGER.

NEW YORK.

Law Notes

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CONTENTS

Constitutional Recall in Oregon.

THE Oregon constitutional provision for recall of "every public officer" was adopted in 1908 by a vote of 53,381 against 31,002. "There may be required twenty-five per cent., but not more, of the number of electors who voted in his district at the preceding election for justice of the Supreme Court to file their petition demanding his recall by the people. They shall set forth in said petition the reasons for said demand. . . . If he shall not resign within five days after the petition is filed, a special election shall be ordered to be held within twenty days in his said electoral district to determine whether the people will recall said officer. On the sample ballot at said election shall be printed . . . in not more than two hundred words, the officer's justification of his course in office. . . . Other candidates for the office may be nominated to be voted for at said special election. . . . The recall petition shall be filed with the officer with whom a petition for nomination to such office should be filed, and the same officer shall order the special election when it is required. . . . Such additional legislation as may aid the operation of this section shall be provided by the legislative assembly, including provision for payment by the public treasury of the reasonable special election campaign expenses of such officer."

Is the foregoing provision self-executing? Observe the words "there may be required" in the first sentence, and especially the mandatory form of the last sentence. *No "additional legislation" has been enacted.* Can an officer be ejected before the legislature makes provision "for payment" of his "campaign expenses"? Without such legislation will the secretary of state recognize a petition for recall and order a special election thereon? If he does do so, will a vote adverse to the incumbent operate to vacate the office? If a successor is chosen at the same election, will he acquire a good title to the office?

Even with "additional legislation," if a petition for recall should state no facts upon which an issue in "justification of his course in office" could be joined, as the constitution contemplates — a petition charging him with wife-beating, for instance — would not the electors' judgment adverse to the defendant be void on collateral attack? If a legally insufficient petition against a judge were put in circulation, how about an injunction against the ringleaders or the secretary of state? What other adequate remedy would there be, the defendant judge having no right of appeal, and at present no right to costs if successful? Of course, a criminal proceeding for violation of the injunction should be conducted by the judge against whom the petition is directed, on principles advocated even nowadays by learned lawyers; principles almost as cogent as the reasons given by Chief Justice Jeffreys — we are quite certain it was he — why the testimony of an accomplice was necessarily the very best in the world! We forbear quoting the reasons.

Would the promoters of a petition rejected by the voters be liable in damages at common law if they proceeded maliciously and without probable cause? Or would public policy afford them the same absolute protection that is accorded to a judicial officer acting within his authority or to a witness testifying to relevant facts? If the common law protects them, would it be wise for the legislature to create a liability for unfounded and malicious proceedings, just as the legislature has done in at least one State, in respect of malicious instigators of frivolous proceedings for the disbarment of an attorney? Would such a statute be a constitutional "aid" to "the operation of" the recall provision, or would it be a foul attempt to terrify "good reptiles" — quoting the novelist Fielding's gracious address to his critics — who are striving to serve the public?

Proceeding to Recall an Oregon Judge.

ON June 15 a petition to recall a judge was presented to the Attorney-General of Oregon for his opinion as to its legality in point of form. Upon inspection he pronounced it sufficient in that regard, and its promoters immediately began a canvass for signatures as the basis of an order for a "special election . . . to determine whether the people will recall said officer," in the language of the Oregon Constitution. Omitting the formal address, here is the plaintiff's pleading in a controversy which is to be tried and decided by the Oregon electors called from their daily vocations for that sole purpose — the entire proceeding to be concluded within twenty days from the filing of the pleading:

"That said John S. Coke, Circuit Judge, in the month of May, 1911, while holding Circuit Court in and for Douglas County, State of Oregon, and presiding over the case of the State of Oregon *vs.* Roy McClallen, charged with murder, demonstrated his gross incompetency and unfairness by giving to the jury in said case, at the instance and request of the de-

fendant's attorneys, unfair and erroneous instructions as to the law, intended to bias the jury in favor of the defendant and secure an acquittal and did so bias the jury and cause an acquittal; while at the same time he (said John Coke) failed and refused to give the jury fair and legal instructions which were asked by the prosecution. All of which contributed to and brought about the defeat of the ends of justice."

Instructions "intended to bias the jury." Does this refer to the judge's state of mind, or does the word "intended" merely designate the objectively base quality of the instruction? What was the substance of the instruction which the pleading condemns? The electors will determine those questions on evidence proceeding from the mouths of shouters on the stump, expounded in unregulated arguments made by the same trustworthy vociferators. *Provided,* the petition above quoted eventuates in a special election.

We notice that the Oregon statute does not authorize an appeal by the State from a verdict and judgment of acquittal in a criminal case. A few of the States have such a provision, but its constitutionality is not beyond doubt. See the cases cited in 1 Ann Cas. 655, 664.

In *In re Philbrook,* 105 Cal. 471, 479, the court said: "When people come into courts as litigants they have the right to expect the best judgments of their judges, uninfluenced except by legitimate arguments made openly before them by counsel. They must expect those errors which will sometimes inevitably be committed by minds which are not infallible; but they should be able to feel sure that the impartiality of the court will not be disturbed by any influence of fear or favor. And clearly nothing *tends* more to disturb that impartiality than a menace that the decision of a cause a certain way will destroy or greatly injure the good name of the judge who shall make it."

Recall Unlikely to Be a Permanent Institution.

WHILE the recall of judges as shown in the concrete in the preceding paragraph makes an exceedingly repulsive appearance, it serves to strengthen our belief that the proposition to convert judges into tenants at will is not likely to be widely accepted. Employees of all classes cannot fail to perceive the injustice of summarily ousting a man from his job for alleged odious conduct without giving him a fair opportunity to vindicate himself to his employer. Labor unions especially are solicitous to protect their members from such treatment. Civil service rules are everywhere working to the same end, and the courts are wide awake to co-operate, as we observe in an excellent case of unsuccessful attempt to hoodwink the New York Court of Appeals in *Griffin* v. *Thompson,* (N. Y.) 95 N. E. Rep. 7, decided last May.

There would be no occasion for serious alarm even if the recall should get into a good many constitutions and be actually put in operation; for it will surely harass the community that employs it and consequently be repealed or ignored. A distinguished historian has said that "in almost all statute books, nine-tenths of the legislation comes under the class which might be introduced as an act to repeal an act." The people are constantly committing mistakes and then rectifying them. Take the Bankruptcy Act of 1867, for instance, repealed in 1878. For almost a century there was a provision in the New Hampshire Constitution which suffered none but Protestants to participate in the State government. It did not disappear from the organic law until 1878, but was probably a dead letter long before then. By the way, in respect of freedom from religious bigotry the Arizona Constitution is a republican form of government.

New Jersey Workmen's Compensation Act.

WE have not seen the New Jersey workmen's compensation act which went into effect July 4, but the New York *Sun* says: "It offers an alternative to every employer. He can either do nothing — in which case the law presumes that he agrees absolutely to pay compensation for the injury to or death of every employee arising out of and in the course of employment; . . . or the employer can notify his employee in writing that the provisions of the act are not to apply — in which case the two defenses known as assumption of risk and the fellow-servant doctrine are no longer available to the employer." In the much-discussed case of *Ives* v. *South Buffalo R. Co.,* 201 N. Y. 271, 94 N. E. Rep. 431, Judge Werner says [italics ours]: "The 'fellow-servant' rule and the law of 'contributory negligence' are clearly within the legislative power. These doctrines, for they are nothing more, may be regulated or even abolished. *This is true to a limited extent as to the assumption of risk by the employee.*" It is an axiom in logic as well as in mathematics that the whole includes all its parts, and therefore courts have frequently held that power to grant or withhold absolutely is power to grant or withhold on conditions. But there are exceptions to the rule. Thus, even if a State may refuse to allow a foreign corporation to do business within its borders, an agreement by the corporation, as a condition of being permitted to do business therein, that it will not remove a cause to a federal court, is not binding on the corporation. *Barron* v. *Burnside,* 121 Fed. Rep. 186, 7 S. Ct. Rep. 931, and other cases. While we are inclined to think the provision in the New Jersey workmen's compensation act is not invalid within the reasoning of such exceptional cases, we are not prepared to express a positive opinion on the question. In the Ives case, above cited, Judge Werner remarked that *in the case of corporations,* whose existence depends upon the will of the legislature, "an employer may be made an insurer of the safety of his employees as a condition of the permission to engage in business." The New Jersey act is not limited to corporations.

Compensation Acts and Employers.

ONE result of the New Jersey workmen's compensation act just passed is an increase in the premium rates for employers' liability insurance in that State. Governor Dix, of New York, recently sent a message to the legislature at Albany announcing that the rates of taxation imposed by the existing New York inheritance tax law have driven an enormous amount of capital from the State, reducing by $2,000,000 a year not only the income derived from inheritance taxes, but also that from corporations and property taxes. Will a workmen's compensation act, if upheld by the courts, cause a migration of capital? We do not expect such a result. It will probably have no more effect in that direction than would the sending of employers to the penitentiary for keeping the doors of their workrooms locked in violation of law. If a

compensation act stimulates an employer to the exercise of more care than has been customary in respect of the conditions surrounding his employees, the net result may be a real pecuniary benefit to employers as a class. Speaking of the Safety Appliance Act of Congress of 1893 prohibiting the use by railroad common carriers in interstate commerce of any car not equipped with automatic couplers, Judge Smith McPherson said: "While I suppose, of course, there are no statistics to prove it, I have no doubt that the enforcement of this statute has been a money-saving proposition to the railroad companies. I have no doubt that the occasional infliction of a small penalty of $100 prevents many a $5,000 or $10,000 judgment." *U. S.* v. *Chicago, etc., R. Co.,* 174 Fed. Rep. 684. When a valued policy law was enacted in New Hampshire about twenty-five years ago, all the foreign fire insurance companies doing business in that State "struck" by leaving the State. One immediate and significant consequence was that the number of fires in New Hampshire fell off something more than fifty per cent. If workmen's compensation acts, enforcement of the Sherman Anti-trust Act, reduction of excessive tariff duties, and the like, require the addition of brains to capital and main force in order to insure success in business, it may be an all-round desirable consummation.

Identification of Speaker by Voice in Dictagraph.

ON the recent Diegel bribery trial in Ohio a stenographer was allowed to testify to conversations alleged to have taken place between a detective and the defendant in one room, which were communicated by means of a concealed dictagraph to the witness sitting in another room, who took them in shorthand. Very properly, however, the witness was required to identify the defendant as the speaker by means other than the name which the detective addressed to the speaker. The inventor of the instrument took the stand and explained the operation of the apparatus to the jury. He afterwards gave a demonstration, said the newspapers, in the office of the prosecuting attorney, whispers in the room being heard and repeated by a person on the receiving end in another room cross the hall. It was reported that a whisper made against the back of the prosecuting attorney, who stood with his chest against the transmitter, was heard and distinctly repeated. The weight of the stenographer's testimony depends upon the amount of genuine corroboration it gave to the detective's testimony. Identification of a person by his voice at a telephone or without any instrumental medium may be very strong or very weak evidence, according to all the circumstances, and a jury is especially qualified to estimate its value. Prepossession of the witness, that is to say, his knowledge that the person whom he attempted to identify is the one whom the other witness declares he was talking with, must unquestionably be carefully considered if the evidence is conflicting. In a civil case the defendant's failure to contradict the witnesses would practically amount to a confession that their testimony was true. Competent triers of facts almost always so regard it. But in a criminal case, except in New Jersey (*Twining* v. *New Jersey,* 211 U. S. 78, 29 S. Ct. Rep. 14) and perhaps nowhere else, if the defendant remained silent the jury would have no right — albeit they might have the *power* — to draw that inference.

In *Brown* v. *Brown,* 63 N. J. Eq. 348, 357, 50 Atl. Rep. 608, 611, the court declined to give any weight to the testimony of a witness who declared that he recognized a woman, out of his sight, whom he had never met, by hearing her utter the three words, "You naughty fellow." "And when he putteth forth his own sheep, he goeth before them, and the sheep follow him: for they know his voice." John x. 4. But a stranger uttering the familiar call for sheep could easily deceive them, we imagine, especially if he were out of their sight.

Testimony as Corroborative.

IT seems to us that a fair and useful test to determine whether testimony claimed to be corroborative of other testimony amounts to much is the simple inquiry whether the jury would be greatly surprised if it were afterward admitted or conclusively proved that the corroborating witness was mistaken. A little analysis shows that this is really the same test that will be applied in any other rational discussion of the value of the testimony. We merely suggest the different way of presenting it. If the stenographer, who had never before heard the speaker's voice delivered by a dictagraph or even by a telephone, were mistaken in his identification, would anybody be greatly astonished? Again, ask the jury to imagine that the principal witness had testified exactly contrary to the testimony he actually gave, and then to consider whether the corroborating witness's testimony remaining as now given would go far to overcome the principal.

But even in jurisdictions where judges are authorized to comment upon the evidence in their instructions to juries, they must usually be careful not to argue too strongly by means of an imaginary situation. In *State* v. *Hawley,* 63 Conn. 47, 27 Atl. Rep. 417, the defendant on trial for murder strenuously contended that his wife Flora committed the deed. In the course of his charge to the jury the trial judge said: "If Flora Hawley was on trial before you, as John Hawley is and she is not, how long would you hesitate on the evidence before you, and with no opportunity on her part to add to it, in rendering your verdict, and can there be any doubt as to what that verdict would be?" A judgment of conviction was reversed by the Supreme Court of Errors, Carpenter, J., saying:

> "It seems to us that the evidence tending to connect Flora Hawley with the commission of the crime was not submitted to the jury just as it ought to have been. The jury may have understood from the charge that, in order to have that evidence avail the accused, it was necessary that they should be satisfied beyond a reasonable doubt that she was guilty of the offense; whereas the true question, we think, is whether there is such evidence *tending* to connect her with the crime as will raise a reasonable doubt whether John Hawley was guilty. That, and not whether Flora Hawley was guilty, was the material question in this part of the case for the jury to determine."

Interstate Carriers Overworking Employees.

IN the United States Court at Cincinnati, July 5, actions were instituted against the Big Four and the Chicago, Hamilton and Dayton railroad companies, to recover fines for alleged violation of the provisions of the Act of Congress of March 4, 1907 (Fed. St. Ann. Supplement, 581), making it unlawful for an interstate common carrier "to require or permit any employee actually engaged in or connected with the movement of any train to be or remain on duty for a longer period than sixteen con-

secutive hours," etc. Among other things, it is alleged that one of the companies worked freight crews of five men from 3.30 o'clock in the morning until 9.30 the next night. Local officials of the defendant companies vehemently declare that there must be some mistake and that they have never worked their men longer than the legal limit. It is to be hoped that this is true, for wilful and gross violation of the provisions of the statute ought to be made as serious a crime as peonage or bank wrecking. The well-being of employees is not the principal matter involved, but the lives of interstate travelers whose safe transportation should not depend upon the alertness of fagged and sleepy employees.

Before daylight on July 11, an express train approaching Bridgeport was derailed, killing ten passengers and the engineer and fireman instantly and injuring fifty others. The engineer was a freight engineer, but had sometimes run passenger trains; his train was an hour behind time, and he was running at the rate of sixty miles an hour although the time card rules specified fifteen miles per hour as the speed for that place. What penalty would be adequate for railroad officials who had deliberately compelled this freight engineer to study time tables and perform his other duties after sixteen hours of continuous work, if it were proved beyond doubt that the accident was attributable to the exhaustion of the engineer? Of course it is not to be supposed that such was the case, and the incident is mentioned merely to illustrate the perils which the Act of Congress is designed to prevent.

California Asexualization Statute.

IN another column of this number we print a letter from a member of the California bar quoting a statute of that State enacted in 1909, which authorizes the asexualization of certain moral and sexual perverts confined in the State prison or the State hospital for the insane. There is hardly any doubt that it was designed to legalize castration of the persons described, and perhaps the prerequisite of conviction for sexual offenses, in view of the context, does not make the castration a punishment for crime. The weather at this season (July 12) is not favorable for a minute study of novel constitutional questions which our correspondent invites us to discuss. To our minds this particular statute is probably constitutional, or at least may be executed in a constitutional manner. But the writer of this paragraph believes that castration performed as a punishment for any crime, or inflicted upon criminals *because* they are criminals, though under the pretext of preventing propagation of their kind, is "cruel and unusual" within the constitutional prohibitions. "What is Cruel and Unusual Punishment" is the title of an exhaustive note in 19 Ann. Cas. 725, published in June. Can any of our readers name a punishment which cannot be discontinued despite an unconditional pardon and yet can be constitutional? Upon pardon of a convict confined under a sentence of imprisonment, even for life, he regains his liberty. In the writer's opinion any physical punishment which will not cease though the convict be pardoned upon conclusive proof of his innocence, is manifestly cruel.

An interesting case is *Ah Kow* v. *Nunan*, 5 Sawy. (U. S.) 552, 12 Fed. Cas. No. 6454, wherein the court held that an ordinance of the city of San Francisco requiring the sheriff to cut the hair of all inmates of the jail to a uniform length of one inch from the scalp was invalid as applied to Chinamen.

Women Lawyers vel non in Georgia.

A FEW weeks ago Judge Pendleton of the Georgia Superior Court created a commotion in that State by denying a woman's application for admission to the bar on the ground that she was not eligible as a "male citizen" within the meaning of that term in the Georgia Code, § 4932, giving to a person of that description the right to a license to practice law. A week or two afterward a bill was introduced in the Georgia legislature, then in session, amending the code section by striking out the word "male" and adding the words "whether male or female." Doubtless the applicant for a license to practice knew very well that the court could not grant the license, and she inverted the regular procedure of first going to the legislature in order to bring into greater public prominence the fact that a woman graduated at the Atlanta Law School, and admittedly possessing every educational and moral qualification to practice law, must be denied that privilege in Georgia. We do not know Judge Pendleton's degree of advancement in life's journey, but Chief Justice Clark of North Carolina says the judges who have denied applications of women to practice law were "presumably elderly men" and not so responsive as they should be. *In re Applications for License,* 143 N. Car. 1, 17, 55 S. E. Rep. 635. Women are now eligible for admission to the bar in all federal courts, and in Maine, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, North Carolina, Indiana, Michigan, Ohio, Oregon, South Dakota, Washington, and several other States.

Christian Science in United States Senate.

IN a speech in the United States Senate, July 6, Senator Works of California warmly defended Christian Science and related how he and members of his family had been healed of their infirmities by practicing it. One of them was "cured after an illness of fifteen years with a disease which regular doctors said would yield only to the surgeon's knife." Another was for several years a victim of the drink habit, "but since he took the Christian Science treatment this desire has been abolished." This desire, by the way, is vanquished by a famous psychologist as one of his commonplace feats — so he says. Goffe, one of the regicides who fled to New England and died there, recorded the following cure in his diary: "Jan. 20, 1662, three witches were condemned at Hartford. Feb. 24, after one of the witches was hanged, the maid was well." Prof. John Fiske said: "Probably no human belief has so much recorded testimony in its favor, if we consider quantity merely, as the belief in witchcraft; and certainly nobody has refuted all that testimony. . . . When, at Ipswich, in England, in 1664, an old woman named Rose Cullender muttered threats against a passing teamster, and half an hour later his cart got stuck in passing through a gate, one of the most learned judges in England considered this sufficient proof that Rose had bewitched the gate, and she was accordingly hanged. To this kind of reasoning the whole community assented, except half a dozen eccentric skeptics." The judge thus referred to was Sir Matthew Hale, and the case is reported

as "A Trial of Witches at Bury St. Edmonds," 6 How. St. Tr. 647. At Salem, Mass., in 1692, "the physicians having no other way of accounting for the disorder" of the village minister's children, "pronounced them bewitched," says another historian.

Very likely the practice of Christian Science does a great deal of good, and will continue to do so despite such feeble arguments as those presented by Senator Works. The California senator's opinion of the merits of Christian Science has no more intrinsic value than the opinion of the very able senator from Utah respecting the soundness of cardinal beliefs of Mormons. Indeed, we hope Senator Smoot has not the same egregious confidence that is expressed by Senator Works in the opinions of regular physicians — the faith characteristic of believers in Christian Science that an old-school doctor's declaration that a particular physical ailment is incurable must be accepted as truth even if his statement comes in the form of *n*th degree hearsay.

"Constitutional" Members of Congress.

WE learn from the columns of an exchange that a California member of Congress has introduced a joint resolution, proposing an amendment to the Federal Constitution which reads: "The judicial power of the United States shall not be construed to extend to any suit in law or equity by reason of the citizenship of any corporation." The Congressman's name does not appear in "Who's Who," but either he or some one else who drew the proposed amendment is certainly a lawyer. Is it possible that a lawyer member of Congress does not know that an amendment to the Constitution is not necessary to effect the purpose intended, and that a mere Act of Congress amending the Judiciary Act of 1887–1888 will suffice? It is entirely possible. An Act of Congress passed April 5, 1910, provided, among other things, that no action brought in a State court on the Railroad Employers' Liability Act of Congress of 1907 "shall be removed to any court of the United States." In the debates reported in the *Congresisonal Record* a member rose and solemnly inquired of a speaker if he thought the provision above quoted would be constitutional. Consulting "Who's Who" we were astonished to find the inquirer labeled as a lawyer. "Constitutional senators" is a familiar phrase in the lay press and occasionally appears in a headline. Has any lawyer frugal of his time ever read any of the speeches of the gentlemen at Washington who are dubbed "constitutional," for the purpose of learning constitutional law? Hardly ever, we venture to think. After every congressional election turning a party out of power, "lame duck" members, some of them quite likely "constitutional," have to be provided with offices bringing a modest income which they cannot earn in the practice of their profession. Pathetic instances have occurred where a lucrative office was not forthcoming.

The Black Peril Banana Peel.

IT would not surprise us if excavations in the far East eventually uncover convincing evidence that immediately after our ancestor, Ab, discarded his arboreal habits, prior experience in traveling on tree limbs caused him to ordain the penalty of crucifixion for the dropping of banana skins on the earth paths of bipedalians. At any rate the offense is both ancient and grave, and according to our recollection it has sometimes been specifically mentioned in municipal ordinances. As a source of lawsuits the banana skin has a record equal to buzz saws, laundry mangles, and divers other contrivances of civilized man. In *Anjou* v. *Boston Elevated R. Co.*, 208 Mass. 273, 94 N. E. 386, the plaintiff alighted from one of defendant's cars, waited until the crowd had left the platform, and then inquired of a uniformed employee the direction to another car. "He walked along a narrow platform, and she, following a few feet behind him toward the stairway he had indicated, was injured by falling upon a banana peel." It was described by several witnesses in these terms: It "felt dry and gritty as if there were dirt upon it," as if "trampled over a good deal," as "flattened down and black in color," "every bit of it was black, there wasn't a particle of yellow," and as "black, flattened out and gritty." Whereupon the court Sherlock Holmesized as follows: "The inference might have been drawn from the appearance and condition of the banana peel that it had been upon the platform a considerable period of time, in such position that it would have been seen and removed by employees of the defendant if they had performed their duty. Therefore, there is something on which to base a conclusion that it was not dropped a moment before by a passenger." Judgment for the plaintiff for $1,250. It looks like a perfectly plain case, doesn't it? But reflect a moment. Would it necessarily take "a considerable period of time" for a swiftly moving stream of people to trample a banana peel flat and black? It seems that the able counsel for the railway company expressly staked his defense on the force of a negative answer to that question.

Judicial Candor.

IN extricating themselves from a dilemma, courts of last resort do not always describe the situation and announce their purpose with such courage as the United States Supreme Court did in *Ex p. Harding,* 219 U. S. 363, 378, 31 S. Ct. 321, decided last February. After stating the rulings of that court in several preceding cases, Chief Justice White said: "We must, then, either reconcile the cases, or, if this cannot be done, determine which line rests upon the right principle; and having so determined, overrule or qualify the others and apply and enforce the correct doctrine. This is the case, since to do otherwise would serve only to add to the seeming confusion and increase the uncertainty in the future as to a question which it is our plain duty to make free from uncertainty." Again, in the *Standard Oil Case* (U. S.), 31 S. Ct. 502, 518, the same distinguished jurist said: "If it be now deemed that the Freight Association Case was mistakenly decided or too broadly stated, the doctrine which it announced should be either expressly overruled or limited. . . . And in order not in the slightest degree to be wanting in frankness, we say that in so far, however, as, by separating the general language used in the opinions in the Freight Association and Joint Traffic Cases from the context and the subject and parties with which the cases were concerned, it may be conceived that the language referred to conflicts with the construction which we now give the statute, they are necessarily now limited and qualified."

In *Thompson* v. *Lawley,* 2 B. & P. 302, 312, a case decided by Lord Eldon, where a preceding case in point had to be considered, we find him speaking as follows:

"That case having once established a general rule, I had rather consent pointedly and avowedly to contradict that rule in terms, than to acknowledge it in words and deny it in effect by raising distinctions which in fact make it impossible for any man to decide in any particular case what is the legal construction of a will as to this point, till he has obtained the authority of a court of law, in a judgment upon the will, for the opinion which he gives."

A Commendable Precedent.

ANY one who peruses even a few of the reported opinions of Judge Platt of the United States District Court for the District of Connecticut cannot fail to notice his unconventional and sometimes rather bizarre style in discussing questions and parties and the general "atmosphere" of cases. His remarks often resemble in piquancy — as well as good sense — passages found in Mr. Justice Gaynor's opinions when he was on the bench of the New York Supreme Court. In *In re Belfast Mesh Underwear Co.*, 185 Fed. Rep. 834, appears a judicial civility which is noticed here because, we fear, cases are all too numerous where other judges could but don't do likewise in recognition of highly instructive briefs filed by counsel. In that case, affirming an order made by Frank B. Munn, Esq., of Winsted, Conn., a referee in bankruptcy, Judge Platt says: "The decisions which warrant his order are set forth at length and with intelligent care in his certificate, and it would add nothing to say over again what he has said so well. By doing so the writer might gain credit with the unthinking, but he has no ambition for that kind of reputation."

AERIAL NAVIGATION.

IN an article on "Liability for Accidents in Aerial Navigation" in the *Michigan Law Review* for November, 1910, former Chief Justice (now Governor) Baldwin argues that common-law principles would make an aviator absolutely liable for injuries caused by his accidental descent on persons or property.

> "He undertook to launch into the air, for his own purposes or pleasure, something which the force of gravity would certainly constantly be dragging downward. . . . The thing was, while in the air, inherently and continually a menace to the security of everything beneath it. It was a thing of danger to all men and to the property of all men. If I have a fancy to keep a tiger caged in my parlor, as a household pet, I am responsible if he gets into the street, although it was some casual visitor who left the cage door open."

"The analogy between driving an airship through the air and driving a vessel through the water, or a wagon over the land, is, in the nature of things, an imperfect one," he says. "The force of gravity holds the vessel to the water, the wagon to the earth. Their normal position is one of safety. But this same force, as suggested above, is continually pulling the airship to a fall, and making its normal condition one of danger to all upon or below it." A recent incident in aerial navigation leads us to inquire whether the analogy between an aeroplane and a caged tiger pet is not also imperfect. On July 3, an aviator ascended from Governor's Island, and while cruising over Brooklyn at an elevation of 2,000 feet his motor stopped. Did the force of gravity then put the Brooklynites in imminent peril? By skilful manœuvring the navigator not only avoided falling on the city, but passed over the water and alighted near his starting place. In late years the courts have frequently warned us against dogmatism in drawing lines between the possible and the impossible in respect of the operation of physical forces. (See Moore on Facts, § 150.) If a railroad train leaves the rails on a high embankment, trestle, or "fill," it may rush down and destroy the house of a man who owned none of the land taken for the company's roadbed, and who would have been entitled to no compensation for the menace to his property, although his exposure to danger might really be more serious, in view of the above-mentioned incident in aviation, than the chance that an accident to an airship immediately over his house would cause the machine to fall at that place. The airship pilot might control his craft, while the locomotive engineer would be helpless. Still we must agree with Chief Justice Baldwin that the heavier-than-air machine, if destitute of motive force, will be compelled to hustle for a landing place somewhere which may not be one of pure choice.

The force of gravity aided by spiked steel rails is necessary to enable an electric car to run on the streets with safety to those within striking distance of it. Many ordinarily thoughtful lawyers, thinking they perceive a sure analogy, would hastily conclude that a horse running away with an empty wagon will have even more freedom than an inanimate object in motion and will go where it listeth unless restrained by very substantial barriers. With the rapidly increasing use of horseless vehicles our lawyers may come to need instruction in the psychology of horses by an old-timer on the bench; for example, by such as Mr. Justice Boyce of Vermont, who said that the law requires railings on highway bridges "not merely to resist the force of the horse when terrified and unmanageable, but chiefly to guide the eye of the animal, and give it a sense of confinement within them." *Holley* v. *Winooski Turnpike Co.*, 1 Aik. (Vt.) 74, 80. Mayhap in the near future a refractory aeroplane will be easily subdued by the brain of the aviator. More wonderful things than that have occurred in our generation, achievements as great as that wonder of which Lord Macaulay spoke admiringly in one of his essays, and which makes us smile, viz., the forcing a ship through the water and against the wind at a rate exceeding ten knots an hour!

PARTIAL DELIMITATION OF THE RIGHT TO STRIKE.

IN *De Minico* v. *Craig*, 207 Mass. 593, 94 N. E. Rep. 317, the following doctrines were laid down: To make a strike a legal strike it is necessary (1) that the strikers should have acted in good faith in striking, and (2) that the strike should have been for a purpose which the court holds, as matter of law, to have been a legal purpose for a strike; but it is not necessary that they should have been in the right in instituting a strike for such a purpose. On the other hand, a strike is not a strike for a legal purpose because the strikers struck in good faith for a purpose which they thought was a sufficient purpose for a strike. The foregoing are the words of the court, but too abstract and indefinite for valuable instruction. The facts were that the complainant was a member of the Granite Cut-

ters' International Association, which had about 100 granite cutters and tool sharpeners working in a shop of Wells Bros., the complainant and another man being their foremen. In the performance of their duty to enforce certain shop rules, the complainant and his associate foreman enforced them "more strictly than the men had been accustomed to have them enforced," but "the personal attitude and conduct of the complainant toward the men was not unduly oppressive." One of the workmen claiming that he had been discharged, a meeting of the association was immediately held, and a vote to strike was carried only by the aid of members of the association who were not working for Wells Bros. The strike was settled in a day or two as the result of an agreement between Wells Bros. and the adjustment committee of the association, by which the men went back to work, and the plaintiff was removed as foreman, but continued to work for Wells Bros. as a journeyman for lower wages until in a few months the work was done. The court found as a fact that the purpose of the strike was to get rid of the foremen because some of the workmen had personal objections to and a dislike for them; or, to use the words of complainant's counsel, said the court, because these foremen were "distasteful to some of the employees." In the opinion of "a majority of the court" — there was no expressed dissent — this was not a legal purpose for a strike, and the complainant was given a decree against the president and secretary of the association and the members of its adjustment committee for $500 damages assessed by the master as a lump sum for what he had suffered, including loss of wages; the court intimating, however, that he might have been entitled to recover for damages to his reputation if he had proved that damage to his reputation was in fact caused by the defendants' illegal action.

For the purpose of preventing misapprehension of what was decided the court made the following interesting statement:

"The plaintiff had a right to work, and that right of his could not be taken away from him or interfered with by the defendants unless it came into conflict with an equal or superior right of theirs. The defendants' right to better their condition is such an equal right. But to humor their personal objections, their likes and dislikes, or to escape from what 'is distasteful' to some of them, is not, in our opinion, a superior or an equal right.

"It is doubtless true that in a certain sense the condition of workmen is better if they work under a foreman for whom they do not have a personal dislike; that is to say, one who is not 'distasteful' to them. But that is not true in the sense in which those words are used when it is said that a strike to better the condition of the workmen is a strike for a legal purpose. One who betters his condition only by escaping from what he merely dislikes and by securing what he likes does not better his condition within the meaning of those words in the rule that employees can strike to better their condition.

"The defense in the case at bar has not failed because a strike to get rid of a foreman never can be a strike for a legal purpose. We can conceive of such a case. If, for example, a foreman was in the habit of using epithets so insulting to the men that they could not maintain their self-respect and work under him, a strike to get rid of him, in our opinion, would be a legal strike. It is not necessary in the case at bar to define such cases and lay down their limits."

"It is wiser, in our opinion, in matters such as we are now dealing with," concluded Mr. Justice Loring, "to go no farther than to decide each case as it arises." Unquestionably the wiser course in this class of cases.

SANDWICH "GUESTS" AND BREAKFAST "GUESTS."

IN *The King* v. *Byng*, 43 Nova Scotia 40, next to the latest report for that province, the question was whether two men who obtained intoxicating liquors from the defendant were his "*bona fide* guests" within the meaning of that phrase in the Liquor License Act which enabled him, as the holder of a hotel license in the city of Sydney, to sell liquor to such guests. One of the two men, said the court, was a guest only in the sense that he got a glass of beer and a sandwich with it, while the other got some whiskey and some bread with it, suggested by the landlord in order to qualify. The magistrate convicted the defendant, and the Supreme Court agreed with him. The following cases construing the phrase "*bona fide* traveler" in the English act were referred to: *Penn* v. *Alexander* (1893), 1 Q. B. 522 (citing *Taylor* v. *Humphries*, 17 C. B. N. S. 539); *Parker* v. *Queen* (1896), 2 Ir. R. 404.

In the first case (*Penn* v. *Alexander*) Collins, J., said:

"In all these cases the test must be the object of the journey. If that object is pleasure or business, a man will be a *bona fide* traveler; but if the form of pleasure be to drink beer, he will not be, for the beer, and not the traveling, would be the object of his journey."

On all the facts disclosed in the record, Cave, J., in a rather strong opinion dissented from the conclusion of Collins, J., but the latter was then supported in a stunning opinion by Lord Chief Justice Coleridge.

In the Nova Scotia case, Graham, E. J., meditated to this effect: "When the hotel keeper complies with the guest's purpose (by the statute, drink can only be served during the regular meals to be drunk at the table during the meal) and admits the guest to the meal, then drink as an incidental and secondary matter may be supplied to him. It cannot be difficult to ascertain this fact, namely the purpose, from the circumstances. A man away from the place of residence where he usually gets his meal, not having had a meal, will resort to an hotel. He generally takes it at a regular hour for meals. Then there are materials and the price of the meal, the relative importance of the meal to the liquor consumed. I think a magistrate or a jury, after a few questions directed to those and kindred circumstances, would have very little difficulty in determining whether the man was there for the meal or for the drink." Four other judges concurred, Laurence, J., saying: "The procuring of the 'sandwich' by one witness and the 'bread' by the other with the liquor was merely a device, and a very transparent one, to evade the law." Meagher, J., dissented.

In *The King* v. *Byng*, 43 Nova Scotia 43, the same defendant had been convicted by the same magistrate for sale on another day under the following facts, set out in the record: "A man named Jeremiah King called at defendant's hotel and asked for and obtained his breakfast and at the same time obtained intoxicating liquor, for which he paid defendant. King was not a permanent boarder at this hotel. The evidence was to the effect that he left home without his breakfast, was on his way to North Sydney, and called in this hotel and obtained his breakfast and the liquor as above stated."

In this case a majority of the Supreme Court decided to quash the conviction. Judge Graham said: "Of course I think it is unusual for persons bearing English names to drink intoxicating liquors with breakfast, and

that coupled with other circumstances might establish a want of *bona fides*, but it stands alone as a suspicious circumstance."

Longley, J., said, in a concurring opinion: "If a man enter an hotel and called for either breakfast, luncheon, or dinner at the time such meals were regularly served, while partaking of either of such meals, the owner would be at liberty to serve him with liquors, under the terms of his license, even if that meal was his only relationship with the hotel; I think the sitting down to any regular meal at an hotel constitutes a person a guest." Drydake, J., also concurring, said: "It is a sound rule in law, I take it, that a person cannot be convicted where the inferences that can be drawn from proved facts are as consistent with innocence as with guilt. Here, to my mind, on the facts as stated, no reasonable inference of guilt can be drawn."

Laurence, J., dissented, because "from the facts stated in the case," said he, "I am for myself unable to infer that because a person calls at an hotel and obtains a breakfast, and at the same time purchases liquor, therefore the sale was during a regular meal at this hotel, and the liquor was sold to be drunk or used at a regular meal and at the table, and not otherwise." He thought the conviction was sustainable on the supposition that the magistrate justly inferred a violation of the statutory provision inflicting a penalty upon any one who "sells or disposes of any liquor to any such guest or lodger otherwise than during regular meals to be drunk at the table during such meal."

A CRITICISM OF ENGLISH CRIMINAL PROCEDURE.

Two recent murder trials at the Old Bailey will no doubt serve to bring sharply before the mind of the public the wide change that has taken place in our criminal procedure during the past twelve years, and, although the profession is well aware of this radical alteration, we do not think that until the last six months this change has been in general really appreciated. Although the Criminal Evidence Act 1898 was cautiously drafted and every effort was made for the purpose of safeguarding prisoners, it cannot be denied that the forecasts made as to the effect of that measure when it was before Parliament have been amply proved accurate. It has always been our boast, so far as the administration of our criminal law is concerned, that a prisoner must be deemed to be innocent until he is proved guilty of the specific crime with which he is charged, and that the onus is upon the prosecution to prove his guilt of such specific crime without a shadow of a doubt. The effect of the Act of 1898 has been imperceptibly and gradually to change that position, and to a large extent nowadays the onus of proving his innocence in many cases in fact falls upon the accused. This has been brought about by the fact that juries are well aware that a prisoner can go into the witness box, and, if he does not do so, are apt to draw unfavorable conclusions therefrom, although his omission to give evidence cannot be made the subject of comment. Further, where the prisoner does elect to give evidence on oath, he often does not make the best of witnesses when subjected to cross-examination. This is so whether he be innocent or guilty, for a person charged with a serious offense, who possibly has been confined to prison for weeks before his trial, cannot be supposed to be in the best mental condition for doing himself entire justice. An even more difficult position is created by the statute by the provision which allows cross-examination as to previous convictions and character where the accused "has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defense is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution." In this way, if the prisoner's past does not bear investigation, the defense is undoubtedly placed in a very difficult position, which becomes more accentuated the more disreputable the witnesses for the prosecution may be. As the *Times* truly points out in commenting upon the injurious way the present rule may work: "A witness with a bad character, quite unworthy of being believed, may be allowed to tell his lying tale with impunity; counsel for the defense hesitating to expose the witness's past by searching questions, because he may subject his client to a like ordeal." We may be old-fashioned in our ideas, but we feel sure that bygone judges would have been astounded at the type of cross-examination which has been published in certain recent criminal trials, and in saying this we make no imputation against the prosecuting counsel, who have merely been carrying out the duty that has been imposed upon them by the Act. A great deal has been said and published in the past about what are called "Continental methods," but it is useless to deny that our present procedure is directing its course towards the way in which criminal trials are conducted in most foreign countries. At any rate, so far as we here are concerned, the time has now arrived for the legislature to make up its mind which method it intends to adopt, whether to go back to our old principles of compelling the prosecution to prove its case entirely apart from the accused, or whether the principle to be acted upon is to be that at all hazards guilt must be proved even out of the mouth of the prisoner himself. For ourselves, we are strongly of opinion that the old rule was the right one, and that a person's guilt of the specific offense with which he is charged should be proved without doubt by the witnesses for the prosecution, and that neither directly nor indirectly should any onus be placed upon the accused of proving his innocence. Such a state of affairs has always been strongly repugnant to the British sense of criminal justice, and it is difficult to deny that the indirect effect of the Act of 1898 has been to bring about such a result. — *London Law Times.*

A HUMORIST OF THE ENGLISH BENCH.

THE English are for the moment mourning the loss of Judge Francis Henry Bacon, whose death is reported in another column. To wisdom Judge Bacon added a sage wit that made him twice as capable a public servant as he might otherwise have been, says the *Boston Transcript.*

Judge Bacon was widely known as a wit and a judicial humorist. But he was a wise and learned judge as well as a man of genial and sunny disposition. Whenever he made a caustic comment it was reported, but he said a thousand wise and sound things for every funny one, and of these the world learned nothing.

Though a bachelor, his Honor was not only a judge of but an expert in women's dress, and he probably had more to do with misfits than the rest of his brother judges put together. At no other court than his has the incriminated dress been so often produced and submitted to the actual test of trying on.

One of his remarks which caused the greatest comment was that no woman's hat ought to cost more than 7*s.* 6*d.* In a case last October he said it was affectation for women to go to a tailor to have dresses made. Women, he remarked, could do the work just as well as men.

Among examples of his wit and wisdom were the following observations:

"Don't be alarmed at an untruth. You say you will fall down if you hear more untruths. If it affected me that way I should spend my time groveling on the floor of this court.

"Women tell stories so much easier than men.

"A rich wife is, to some, a trade, like many others.

"When a man is in debt, and the pressure of poverty comes, the finer feelings go away through the window."

On one occasion a defendant loudly protested that his clothes did not fit. Working himself into a great rage, the man threw off the coat and wrenched off his waistcoat. Judge Bacon leaned forward and asked, "Do the trousers fit?" There was a roar of laughter from those present, who were wondering when the man's rage would expend itself.

Judge Bacon was impatient with those who feigned modesty. A woman remarked, "She used dreadful words and I will not repeat them. Can I write them down?" "Yes," replied the judge, "if you know how to spell them."

"With money lenders," he once said, "I have much to do. My own impression is that the lender is about as honest as the borrower. As a general rule there is no misrepresentation which a man will not make when he wants to borrow money, and naturally when he doesn't want to pay it back he will repeat the operation."

Cases of Interest.

MORAL OBLIGATION AS A SUFFICIENT CONSIDERATION FOR A PROMISE. — In Scott *v.* Monte Cristo, etc., Development Co., (Cal.) 115 Pac. 64, it was held that the moral obligation resting on a corporation to furnish assistance and care to an injured employee for whose injury the corporation was in no wise responsible, constituted a sufficient consideration for an agreement made by its president to pay a physician for professional services rendered such employee.

SIMILARITY OF TRADE NAME WITH ONE NOT VALID AS A TRADEMARK AS UNFAIR COMPETITION. — In Standard Paint Co. *v.* Trinidad Asphalt Mfg. Co., 31 Sup. Ct. Rep. 456, it was held that "rubberoid" was a descriptive word, meaning like rubber, and that "Ruberoid," which was substantially like it, was therefore not the proper subject of a trademark by a manufacturer to designate a certain kind of roofing material manufactured by it. Moreover it was held that it was not unfair competition for another manufacturer of roofing material to put out its goods under the name of "Rubbero" roofing, it appearing that the only imitation by the latter company of the roofing of the former company was that which existed in the use of the word "Rubbero," and that only by the asserted resemblance to the word "Ruberoid." The court said: "To preclude its use because of such resemblance would be to give the word 'Ruberoid' the full effect of a trademark, while denying its validity as such."

CONSTITUTIONALITY OF STATUTE PROHIBITING USE OF PHOTOGRAPH FOR ADVERTISING PURPOSES. — In Sperry & Hutchinson Co. *v.* Rhodes, 31 Sup. Ct. Rep. 490, the United States Supreme Court sustained the constitutionality of the New York statute of 1903, which makes the use of a photograph of a living person for advertising purposes a misdemeanor unless such person consents to such use, thereby sustaining the judgment of the New York Court of Appeals to the same effect. The court said: "It is argued that as before the statute a person could not prevent the use of her portrait by one who took and owned it (Roberson *v.* Rochester Folding Box Co., 171 N. Y. 538, 59 L. R. A. 478, 89 Am. St. Rep. 828, 64 N. E. Rep. 442), to deny that use now is to deprive the owner of his property without due process of law. The Court of Appeals held that the statute applied only to photographs taken after it went into effect, as was the photograph of the plaintiff that the defendant used. The property was brought into existence under a law that limited the uses to be made of it, and if otherwise there could have been any question, in such a case there is none. Some comment was made in argument on the distinction between photographs taken before and after the date in 1903, as inconsistent with the Fourteenth Amendment. But the Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time."

GARAGE NOT A STABLE WITHIN MEANING OF WORD AS USED IN BUILDING RESTRICTION. — In Riverbank Imp. Co. *v.* Bancroft, (Mass.) 95 N. E. Rep. 216, it was held that a restriction in a deed executed in 1899, that "no stable of any kind, private or otherwise, shall be erected or maintained on any portions" of the land conveyed was not violated by the building of a garage on the land. The court said: "While it is true, as stated by the plaintiffs, that in the Standard Dictionary, editions of 1895 and 1908, a stable is defined as a building often used for putting up vehicles, and that in the Standard and Century Dictionaries a garage is defined as 'a stable for motor cars' and 'a building, as a stable, for the storage of automobiles or other horseless vehicles,' we nevertheless think that the word 'stable,' as commonly used and understood at the time of the imposition of those restrictions, . . . carried the idea not only of a building but also the presence of domestic animals like horses or cattle as its occupants, and that such is the meaning of this word in the restriction. Accordingly it must be held that the building is not a stable within the meaning of the restriction. And this is so even if, as argued by the plaintiffs, a garage is as objectionable as a stable."

LIABILITY OF OWNER OF OIL REFINERY FOR DESTRUCTION OF VEGETABLE GARDEN DUE TO NOXIOUS PRODUCTS EMITTED FROM REFINERY. — In Vautier *v.* Atlantic Refining Co., (Pa.) 79 Atl. Rep. 814, it was held that plaintiffs were entitled to recover damages for injuries to their growing crops of vegetables, caused by noxious products, smoke, and soot emitted from an oil refinery owned and operated by the defendant, notwithstanding that there was no evidence of negligence on the part of the defendant in operating the refinery. The court said: "In Robb *v.* Carnegie Bros. & Co., 145 Pa. 324, 22 Atl. Rep. 649, 14 L. R. A. 329, 27 Am. St. Rep. 694, which is a leading case on the subject, we held that evidence of negligence is not necessary, in order to establish a claim for damages in a suit of this kind. The defendants in that case had erected coke ovens on land adjoining plaintiff's farm. Plaintiff alleged 'that the smoke and gas from these ovens passed over his farm, injuring thereby his crops, his soil, and the comfort of his home.' In denying plaintiff's right to recover, defendant contended that the injuries resulted 'from the pursuit of a lawful calling, in a lawful manner, without either negligence or malice, on the part of the owner or his employees.' But this court held that, where land is used for manufacturing purposes, the maxim, *Sic utere tuo ut alienum non lædas*, should apply."

WHAT CONSTITUTES MISCONDUCT OF PROSECUTING ATTORNEY IN CONDUCTING A CASE. — In State *v.* Clark, (Minn.) 131 N. W. Rep. 369, a conviction of the defendant upon a verdict of guilty of the crime of carnally knowing a female child was overturned and a new trial granted for misconduct of the attorney who was conducting the case for the State. The court in reversing the judgment of the lower court stated the duties and obligations of a prosecuting attorney in the following words: "The duties and obligations of a prosecuting officer

are not simply those of an attorney in a civil action; for behind him, and largely at his command, are all the forces of organized society. He has by virtue of his office, if worthy of it, great influence with juries, and he should never forget that he is the representative of the sovereignty and justice of the State, and that he must bear himself, in the discharge of his official duties, as a minister of justice, and never as a partisan. He is not bound to make his argument to the jury colorless, or argue both sides of the case, if the defendant is represented by counsel; but he may present forcibly the State's side of the case. He is, however, never justified in thrusting his personality into the case, and expressing his opinion that the defendant is guilty, or stating as a fact anything except what the evidence tends to prove, or which he in good faith expects to prove. If he does otherwise, he is guilty of misconduct."

DUTY OF CARRIER WITH RESPECT TO PERSON WHO ENTERS TRAIN AT STATION NOT INTENDING TO BECOME A PASSENGER. — In Fox *v.* Minneapolis, etc., R. Co., (Minn.) 131 N. Y. Rep. 374, it was held that a railway company was under no duty to hold a train at a way station to give a person who had gone on the train for a conference with a passenger time to alight therefrom, or to aid such person in getting off the train safely by giving signals or lighting the station platform, the trainmen having no notice that such person was about to leave the train and having in no way assented to his going on the train for said purpose. The court said: "From this statement of the facts it is apparent that the plaintiff was not a passenger upon defendant's train; that the trainmen having no notice of plaintiff's boarding and attempting to alight from the train, and having in no way assented to his doing so, were not charged with any duty to hold the train for his convenience, or to aid him in alighting safely from the train, by giving signals of the starting of the train or otherwise. The absence of light on the station platform was apparent to plaintiff, and the company neither expressly nor impliedly extended to him an invitation to use the unlighted platform to get on and off its train for his own personal purposes. The evidence failed, therefore, to show any negligence on the part of the defendant causing the injury. Further, the plaintiff knew this was a way station, that this train made a short stop there, and that the platform was not lighted at this time. In going on the train without notifying the trainmen, he assumed the risk of the train starting at any time, and of receiving an injury as a result of the known conditions."

LIABILITY OF LANDLORD UNDERTAKING THE MAKING OF REPAIRS AND DOING THEM NEGLIGENTLY. — In La Brasca *v.* Hinchman, (N. J.) 79 Atl. Rep. 885, it was held that a landlord who though under no duty to make repairs on premises leased by him nevertheless made some repairs at the request of his tenant, was liable in damages to the tenant, it appearing that the landlord was negligent in doing the work, the negligence consisting in laying a new floor in a barn on old beams with the result that the floor collapsed under one of the plaintiff's horses, causing the horse's death. The court said: "The gravamen of the defense is that, since there was no covenant or promise to repair contained in the written lease upon the part of the landlord, no legal obligation can arise which will subject the landlord to liability for an accident which could be avoided by the tenant in the exercise of his conceded duty to make repairs. The contention loses sight of the real difficulty in the case, for the claim of the plaintiff is not based upon the actual want of repairs which the tenant was under a duty to assume, but upon the tortfeasance of the landlord in undertaking to make the repairs, and in doing the work negligently. The liability, if it exist, therefore arises entirely *ab extra* the lease between the parties. The principle of liability involved received its first notable application in the famous adjudication of Coggs *v.* Bernard, (1703) 2 Ld. Raymond 909, where Lord Holt gave expression to the doctrine of misfeasance as applied to the dereliction of a mere volunteer, and this doctrine has since found application in various phases of tortfeasance. In that case the bailee undertook to carry the hogsheads of wine as a mere volunteer, and did it so negligently that damage resulted. Liability was not predicated upon a contractual relationship, nor upon the common-law doctrine that one who undertakes to perform an act and performs it negligently, whereby damage results, is liable for his misfeasance."

CONSTITUTIONALITY OF CHILD LABOR STATUTE AFFECTING CHILDREN UNDER SIXTEEN YEARS. — In Beauchamp *v.* Sturges, etc., Mfg. Co., (Ill.) 95 N. E. Rep. 204, the court had under consideration the constitutionality of a statute prohibiting the employment of children under sixteen years of age to operate certain machinery. It was conceded that the legislature, under the police power, had the right to pass legislation which would prohibit the employment of children of tender years in hazardous occupations, but it was said that a boy of sixteen years should be held to have arrived at the age of discretion, and that a statute which prohibited his employment in such occupation was an unlawful interference with his right of contract and was therefore unconstitutional. The contention was not sustained, however, the statute being held constitutional. The court said: "The argument of the appellant is therefore that the statute is unconstitutional because it is unreasonable to prohibit a boy sixteen years of age from engaging in any class of employment, but it is not contended it is unconstitutional by reason of the lack of power in the legislature to legislate upon the subject — in other words, while the statute as applied to a boy fourteen years of age might be constitutional, as applied to a boy sixteen years of age it is unconstitutional. The question is therefore reduced to the proposition that the statute is an unreasonable exercise of the police power, and not a usurpation of that power. While it might be conceded that in a very flagrant case (which question we do not decide) the courts could hold a statute unconstitutional on the ground that it was an unreasonable exercise of the police power, still here it is only claimed that the age limit is fixed too high at which children may be lawfully employed in hazardous employments. Before the courts would assume to interfere and hold a statute unconstitutional, the age limit would necessarily have to be fixed so high as to show clearly, and beyond all question, that the age at which it was fixed was unlawful. We do not think the statute in question is unconstitutional as an unreasonable exercise of the police power."

POWER TO REPEAL PROVISION IN RAILROAD CHARTER EXEMPTING RAILROAD FROM LIABILITY FOR DEATH OF EMPLOYEE. — In Texas, etc., R. Co. *v.* Miller, 31 Sup. Ct. Rep. 534, it was held that a provision of a Louisiana statute incorporating a railroad company which exempted it from liability for the death of any person in its service, even if caused by its negligence, could be repealed by subsequent legislation, it not being within the protection of the contract clause of the United States Constitution. The court said: "The doctrine that a corporate charter is a contract which the Constitution of the United States protects against impairment by subsequent State legislation is ever limited in the area of its operation by the equally well-settled principle that a legislature can neither bargain away the police power nor in any wise withdraw from its successors the power to take appropriate measures to guard the safety, health, and morals of all who may be within their jurisdiction. . . . The fact that the provision in question was embodied in the statute incorporating the Louisiana company does not suffice to show that it became a part of the charter contract, for

obviously nothing became a part of that contract that was not within the contracting power of the legislature. Such of the provisions of the statute as were within that power became both a law and a contract and were within the protection of the contract clause of the Constitution, but such of them as were not within that power became a law only, and were as much subject to amendment or repeal as if they had been embodied in a separate enactment. . . . The subject to which the provision in question relates is the civil liability of a railroad company for the death of its employees, resulting from its negligence. That is a matter of public concern, and not of mere private right. It is closely connected with the safety of the employees, and undoubtedly belongs to that class of subjects over which the legislature possesses a regulatory but not a contracting power. Manifestly, therefore, the charter contract did not embrace that provision, and the contract clause of the Constitution did not prevent its repeal."

New Books.

ENGLISH LEGAL HISTORY.

The Collected Papers of Frederick William Maitland. Edited by H. A. L. Fisher. 3 volumes. Cambridge University Press, 1911. New York: G. P. Putnam's Sons.

These three handsome volumes practically represent the whole mass of Professor Maitland's scattered writings. A few very short notices have been omitted, says the editor, but wherever an article, however brief, contains a new grain of historical knowledge or reveals Maitland's original thought upon some problem of law or history, it has been included in this collection. It is not needed that we should again comment in these columns on Professor Maitland's genius. He is the one writer on the history of English law whose works can be read not only with profit but with genuine delight in their literary excellence. His deep learning never reveals itself in the solemn heaviness so common to other writers on English legal history. No matter how profound his subject, or with what deep learning he has explored it, his touch is always light. Undoubtedly he is the most readable author who has dealt with the English law.

We lift the following from the characteristic essay on "Outlines of English Legal History" in volume two:

Just now and then in the last of the Middle Ages and thence onwards into the eighteenth century, we hear the judges claiming some vague right of disregarding statutes which are directly at variance with the common law, or the law of God, or the royal prerogative. Had much come of this claim, our constitution must have taken a very different shape from that which we see at the present day. Little came of it. In the troublous days of Richard II. a chief justice got himself hanged as a traitor for advising the king that a statute curtailing the royal power was void. For the rest, the theory is but a speculative dogma. We can (its upholders seem to say) conceive that a statute might be so irrational, so wicked, that we would not enforce it; but, as a matter of fact, we have never known such a statute made. From the Norman Conquest onwards, England seems marked out as the country in which men, so soon as they begin to philosophize, will endeavor to prove that all law is the command of a "sovereign one" or a "sovereign many." They may be somewhat shocked when in the seventeenth century Hobbes states this theory in trenchant terms and combines it with many unpopular doctrines. But the way for Hobbes had been prepared of old. In the days of Edward I. the text-writer whom we call Britton had put the common law into the king's mouth; all legal rules might be stated as royal commands.

Still, even in the age of the Tudors, only a small part of the law was in the statute book. Detached pieces of superstructure were there; for the foundation men had to look elsewhere. After the brilliant thirteenth century a long, dull period had set in. The custody of the common law was now committed to a small group of judges and lawyers. They knew their own business very thoroughly, and they knew nothing else. Law was now divorced from literature; no one attempted to write a book about it. The decisions of the courts at Westminster were diligently reported and diligently studied, but no one thought of comparing English law with anything else. Roman law was by this time an unintelligible, outlandish thing, perhaps a good enough law for half-starved Frenchmen. Legal education was no longer academic — the universities had nothing to do with it, they could only make canonists and civilians — it was scholastic. By stages that are exceedingly obscure, the inns of court and inns of chancery were growing. They were associations of lawyers which had about them a good deal of the club, something of the college, something of the trade union. They acquired the "inns" or "hospices" — that is, the town houses — which had belonged to great noblemen: for example, the Earl of Lincoln's inn. The house and church of the Knights of the Temple came to their hands. The smaller societies, "inns of chancery," became dependent on the larger societies, "inns of court." The serjeants and apprentices who composed them enjoyed an exclusive right of pleading in court; some things might be done by an apprentice or barrister, others required a serjeant; in the Court of Common Pleas only a serjeant could be heard. It would take time to investigate the origin of that power of granting degrees which these societies wielded. To all seeming the historian must regard it as emanating from the king, though in this case, as in many other cases, the control of a royal prerogative slowly passed out of the king's hand. But here our point must be, that the inns developed a laborious system of legal education. Many years a student had to spend in hearing and giving lectures and in pleading fictitious causes before he could be admitted to practice.

It is no wonder that under the fostering care of these societies English jurisprudence became an occult science and its professors "the most unlearned kind of most learned men." They were rigorous logicians, afraid of no conclusion that was implicit in their premises. The sky might fall, the Wars of the Roses might rage, but they would pursue the even course of their argumentation. They were not altogether unmindful of the social changes that were going on around them. In the fifteenth century there were great judges who performed what may seem to us some daring feats in the accommodation of old law to new times. Out of unpromising elements they developed a comprehensive law of contract; they loosened the bonds of those family settlements by which land had been tied up; they converted the precarious villein tenure of the Middle Ages into the secure copyhold tenure of modern times. But all this had to be done evasively and by means of circumventive fictions. Novel principles could not be admitted until they were disguised in some antique garb.

A new and more literary period seems to be beginning in the latter half of the fifteenth century, when Sir John Fortescue, the Lancastrian chief justice, writing for the world at large, contrasts the constitutional kingship of England with the absolute monarchy of France, and Sir Thomas Littleton, a justice in the Court of Common Pleas, writing for students of English law, publishes his lucid and classical book on the tenure of land. But the hopes of a renascence are hardly fulfilled. In the sixteenth century many famous lawyers added to their fame by publishing reports of decided cases and by making "abridgments" of the old reports, and a few little treatises were com-

piled; but in general the lawyer seems to think that he has done all for jurisprudence that can be done when he has collected his materials under a number of rubrics alphabetically arranged. The alphabet is the one clue to the maze. Even in the days of Elizabeth and James I., Sir Edward Coke, the incarnate common law, shovels out his enormous learning in vast disorderly heaps. Carlyle's felicity has forever stamped upon Coke the adjective "tough" — "tough old Coke upon Littleton, one of the toughest men ever made." We may well transfer the word from the man to the law that was personified in him. The English common law was tough, one of the toughest things ever made. And well for England was it in the days of Tudors and Stuarts that this was so. A simpler, a more rational, a more elegant system would have been an apt instrument of despotic rule. At times the judges were subservient enough; the king could dismiss them from their offices at a moment's notice; but the clumsy, cumbrous system, though it might bend, would never break. It was ever awkwardly rebounding and confounding the statecraft which had tried to control it. The strongest king, the ablest minister, the rudest lord-protector could make little of this "ungodly jumble."

To this we must add that professional jealousies had been aroused by the evolution of new courts, which did not proceed according to the course of the common law. Once more we must carry our thoughts back to the days of Edward I. The three courts — King's Bench, Common Bench, and Exchequer — had been established. There were two groups of "justices" and one group of "barons" engaged in administering the law. But behind these courts there was a tribunal of a less determinative nature. Looking at it in the last years of the thirteenth century we may doubt as to what it is going to be. Will it be a house of magnates, an assembly of the lords spiritual and temporal, or will it be a council composed of the king's ministers and judges and those others whom he pleases for one reason or another to call to the council board? As a matter of fact, in Edward I.'s day, this highest tribunal seems to be rather the council than the assembly of prelates and barons. This council is a large body; it comprises the great officers of state — chancellor, treasurer, and so forth; it comprises the judges of the three courts; it comprises also the masters or chief clerks of the chancery, whom we may liken to the "permanent under-secretaries" of our own time; it comprises also those prelates and barons whom the king thinks fit to have about him. But the definition of this body seems somewhat vague. The sessions or "parliaments" in which it does justice often coincide in time with those assemblies of the estates of the realm by which, in later days, the term "parliaments" is specifically appropriated, and at any moment it may take the form of a meeting to which not only the ordinary councillors, but all the prelates and barons, have been summoned. In the light which later days throw back upon the thirteenth century we seem to see in the justiciary "parliaments" of Edward I. two principles, one of which we may call aristocratic, while the other is official; and we think that, sooner or later, there must be a conflict between them — that one must grow at the expense of the other. And then again we cannot see very plainly how the power of this tribunal will be defined, for it is doing work of a miscellaneous kind. Not only is it a court of last resort in which the errors of all lower courts can be corrected, but as a court of first instance it can entertain whatever causes, civil or criminal, the king may evoke before it. Then lastly, acting in a manner which to us seems half judicial and half administrative, it hears the numerous petitions of those who will urge any claim against the king, or complain of any wrong which cannot be redressed in the formal course of ordinary justice.

In the course of the fourteenth century some of these questions were settled. It became clear that the Lords' House of Parliament, the assembly of prelates and barons, was to be the tribunal which could correct the mistakes in law committed by the lower courts. The right of a peer of the realm to be tried for capital crimes by a court composed of his peers was established. Precedents were set for those processes which we know as impeachments, in which the House of Lords hears accusations brought by the House of Commons. In all these matters, therefore, a tribunal technically styled "the King in Parliament" but which was in reality the House of Lords, appeared as the highest tribunal of the realm. But, beside it, we see another tribunal with indefinitely wide claims to jurisdiction — we see "the King in Council." And the two are not so distinct as an historian, for his own sake and his readers', might wish them to be. On the one hand, those of the King's Council who are not peers of the realm, in particular the judges and masters of the chancery, are summoned to the Lords' House of Parliament, and only by slow degrees is it made plain to them that, when they are in that House, they are mere "assistants" of the peers, and are only to speak when they are spoken to. On the other hand, there is a widespread, if not very practical, belief that all the peers are by rights the king's councillors, and that any one of them may sit at the council board if he pleases. Questions enough are left open for subsequent centuries.

Meanwhile the Council, its actual constitution varying much from reign to reign, does a great deal of justice, for the more part criminal justice, and this it does in a summary, administrative way. Plainly there is great need for such justice, for though the representative commoners and the lawyers dislike it, they always stop short of demanding its utter abolition. The commoners protest against this or that abuse. Sometimes they seem to be upon the point of denouncing the whole institution as illegal; but then there comes some rebellion or some scandalous acquittal of a notorious criminal by bribed or partial jurors, which convinces them that, after all, there is a place for a masterful court which does not stand upon ceremony, which can strike rapidly and have no need to strike twice. They cannot be brought to admit openly that one main cause of the evils that they deplore is the capricious clumsiness of that trial by jury which has already become the theme of many a national boast. They will not legislate about the matter, rather they will look the other way while the Council is punishing rich and powerful offenders, against whom no verdict could have been obtained. A hard line is drawn between the felonies, for which death is the punishment, and the minor offenses. No one is to suffer loss of life or limb unless twelve of his neighbors have sworn to his guilt after a solemn trial; but the Council must be suffered to deal out fines and imprisonments against rioters, conspirators, bribers, perjured jurors; otherwise there will be anarchy. The Council evolves a procedure for such cases, or rather it uses the procedure of the canon law. It sends for the accused; it compels him to answer upon oath written interrogatories. Affidavits, as we should call them, are sworn upon both sides. With written depositions before them, the Lords of the Council, without any jury, acquit or convict. The extraction of confessions by torture is no unheard-of thing.

It was in a room known as the Star Chamber that the Council sat when there was justice to be done, and there, as "the Court of Star Chamber," it earned its infamy. That infamy it fairly earned under the first two Stuart kings, and no one will dispute that the Long Parliament did well in abolishing it. It had become a political court and a cruel court, a court in which divines sought to impose their dogmas and their ritual upon a recalcitrant nation by heavy sentences; in which a king, endeavoring to rule without a parliament, tried to give the force of statutes to his proclamations, to exact compulsory loans, to gather taxes that the commons had denied him; a whipping, nose-slitting, ear-cropping court; a court with a grim, unseemly

humor of its own, which would condemn to an exclusive diet of pork the miserable Puritan who took too seriously the Mosaic prohibition of swine's flesh. And then, happily, there were doubts about its legality. The theory got about that it derived all its lawful powers from a statute passed in 1487, at the beginning of Henry VII.'s reign, while manifestly it was exceeding those powers in all directions. We cannot now accept that theory, unless we are prepared to say that for a century and a half all the great judges, including Coke himself, had taken an active part in what they knew to be the unlawful doings of the Council — the two chief justices had habitually sat in the Star Chamber. Still we may be glad that this theory was accepted. The court was abolished in the name of the common law.

It had not added much to our national jurisprudence. It had held itself aloof from jurisprudence; it had been a law unto itself, with hands free to invent new remedies for every new disease of the body politic. It had little regard for precedents, and, therefore, men were not at pains to collect its decisions. It had, however, a settled course of procedure which, in its last days, was described by William Hudson in a very readable book. Its procedure, the main feature of which was the examination of the accused, perished with it. After the Civil War and the Restoration no attempt was made to revive it, but that it had been doing useful things then became evident. The old criminal law had been exceedingly defective, especially in relation to those offenses which did not attain the rank of felonies. The King's Bench had, for the future, to do what the Star Chamber had done, but to do it in a more regular fashion, and not without the interposition of a jury.

Far other were the fortunes of the Star Chamber's twin sister, the Court of Chancery. Twin sisters they were; indeed, in the fourteenth century it is hard to tell one from the other, and even in the Stuart time we sometimes find the Star Chamber doing things which we should have expected to be done by the Chancery. But, to go back to the fourteenth century, the chancellor was the king's first minister, the head of the one great secretarial department that there was, the president of the Council, and the most learned member of the Council. Usually he was a bishop; often he had earned his see by diligent labors as a clerk in the Chancery. It was natural that the Lords of the Council should put off upon him, or that he should take to himself, a great deal of the judicial work that in one way or another the Council had to do. Criminal cases might come before the whole body, or some committee of it. Throughout the Middle Ages criminal cases were treated as simple affairs; for example, justices of the peace who were not trained lawyers could be trusted to do a great deal of penal justice, and inflict the punishment of death. But cases involving civil rights, involving the complex land law, might come before the Council. Generally, in such cases, there was some violence or some fraud to be complained of, some violence or fraud for which, so the complainant alleged, he could get no redress elsewhere. Such cases came specially under the eye of the chancellor. He was a learned man with learned subordinates, the masters of the chancery. Very gradually it became the practice for complainants who were seeking reparation of wrongs rather than the punishment of offenses, to address their petitions, not to the King and Council, but to the chancellor. Slowly men began to think of the chancellor, or the Chancery of which he was president, as having a jurisdiction distinct from, though it might overlap, that of the Council.

What was to be the sphere of this jurisdiction? For a long time this question remained doubtful. The wrongs of which men usually complained to the chancellor were wrongs well enough known to the common law — deeds of violence, assaults, land-grabbing, and so forth. As an excuse for going to him, they urged that they were poor while their adversaries were mighty, too mighty for the common law, with its long delays and its purchasable jurors. Odd though this may seem to us, that court which was to become a byword for costly delay started business as an expeditious and a poor man's court. It met with much opposition; the House of Commons did not like it, and the common lawyers did not like it; but still there was a certain half-heartedness in the opposition. No one was prepared to say that there was no place for such a tribunal; no one was prepared to define by legislation what its place should be.

From the field of the common law the chancellor was slowly compelled to retreat. It could not be suffered that, merely because there was helplessness on the one side and corruptive wealth on the other, he should be suffered to deal with cases which belonged to the old courts. It seems possible that this nascent civil jurisdiction of the chancellor would have come to naught but for a curious episode in the history of our land law. In the second half of the fourteenth century many causes were conspiring to induce the landholders of England to convey their lands to friends, who, while becoming the legal owners of those lands, would nevertheless be bound by an honorable understanding as to the uses to which their ownership should be put. There were feudal burdens that could thus be evaded, ancient restrictions which could thus be loosened. The chancellor began to hold himself out as willing to enforce these honorable understandings, these "uses, trusts or confidences" as they were called, to send to prison the trustee who would not keep faith. It is an exceedingly curious episode. The whole nation seems to enter into one large conspiracy to evade its own laws, to evade laws which it has not the courage to reform. The chancellor, the judges, and the Parliament seem all to be in the conspiracy. And yet there is really no conspiracy; men are but living from hand to mouth, arguing from one case to the next case, and they do not see what is going to happen. Too late the king, the one person who had steadily been losing by the process, saw what had happened. Henry VIII. put into the mouth of a reluctant Parliament a statute which did its best — a clumsy best it was — to undo the work. But past history was too strong even for that high and mighty prince. The statute was a miserable failure. A little trickery with words would circumvent it. The chancellor, with the active connivance of the judges, was enabled to do what he had been doing in the past, to enforce the obligations known as trusts. This elaborate story we can only mention by the way; the main thing we have to notice is that, long before the Tudor days — indeed, before the fourteenth century was out — the chancellor had acquired for himself a province of jurisdiction which was, in the opinion of all men, including the common lawyers, legitimately his own. From time to time he would extend its boundaries, and from time to time there would be a brisk quarrel between the Chancery and the law courts over the annexation of some field fertile of fees. In particular, when the chancellor forbade a man to sue in a court of law, or to take advantage of a judgment that he had obtained in a court of law, the judges resented this, and a bitter dispute about this matter between Coke and Ellesmere gave King James I. a wished-for opportunity of posing as the supreme lord of all the justice that was done in his name and awarding a decisive victory to his chancellor. But such disputes were rare. The chancellors had found useful work to do, and they had been suffered to do it without much opposition. In the name of equity and good conscience they had, as it were, been adding an appendix to the common law. Every jot and tittle of the law was to be fulfilled, and yet, when a man had done this, more might be required of him in the name of equity and good conscience.

Where were the rules of equity and good conscience to be found? Some have supposed that the clerical chancellors of the last Middle Ages found them in the Roman or the canon

law, and certain it is that they borrowed the main principles of their procedure from the canonists. Indeed, until some reforms that are still very recent, the procedure of the Court of Chancery was the procedure of an ecclesiastical court. In flagrant contrast to the common law, it forced the defendant to answer on oath the charges that were brought against him; it made no use of the jury; the evidence consisted of written affidavits. On the other hand, it is by no means certain that more than this was borrowed. So far as we can now see, the chancellors seem to get most of their dominant ideas from the common law. They imitate the common law whenever they can, and depart from it reluctantly at the call of natural justice and common honesty. Common honesty requires that a man shall observe the trust that has been committed to him. If the common law will not enforce this obligation it is failing to do its duty. The chancellor intervenes, but in enforcing trusts he seizes hold of and adopts every analogy that the common law presents. For a long time English equity seems to live from hand to mouth. Sufficient for the day are the cases in that day's cause-list. Even in the seventeenth century men said that the real measure of equity was the length of the chancellor's foot. Under the Tudors the volume of litigation that flowed into the Chancery was already enormous; the chancellor was often sadly in arrear of his work, and yet very rarely were his decisions reported, though the decisions of the judges had been reported ever since the days of Edward I. This shows us that he did not conceive himself to be straitly bound by precedents; he could still listen to the voice of conscience. The rapid increase in the number of causes that he had to decide began to make his conscience a technical conscience. More and more of his time was spent upon the judgment seat. Slowly he ceased to be, save in ceremonial rank, the king's first minister. Wolsey was the last chancellor who ruled England. Secretaries of state were now intervening between the king and his Great Seal. Its holder was destined to become year by year more of a judge, less of a statesman. Still we must look forward to the Restoration for the age in which the rules of equity began to take a very definite shape, comparable in rigor to the rules of the common law.

Somehow or another, England, after a fashion all her own, had stumbled into a scheme for the reconciliation of permanence with progress. The old mediæval criminal law could be preserved, because a Court of Star Chamber would supply its deficiencies; the old private law could be preserved, because the Court of Chancery was composing an appendix to it; trial by jury could be preserved, developed, transfigured, because other modes of trial were limiting it to an appropriate sphere. And so our old law maintained its continuity. As we have said above, it passed scathless through the critical sixteenth century, and was ready to stand up against tyranny in the seventeenth. The Star Chamber and the Chancery were dangerous to our political liberties. Becon could tell King James that the Chancery was the court of his absolute power. But if we look abroad we shall find good reason for thinking that but for these institutions our old-fashioned national law, unable out of its own resources to meet the requirements of a new age, would have utterly broken down, and the "ungodly jumble" would have made way for Roman jurisprudence and for despotism. Were we to say that that equity saved the common law, and that the Court of Star Chamber saved the constitution, even in this paradox there would be some truth.

"I HAVE always understood that one judge is not bound by the decision of another judge on a point of law at *nisi prius*." *Per* Bray, J., in Forster *v.* Baker, [1910] 2 K. B. 638.

News of the Profession.

THE ATTORNEYS GENERAL OF THE UNITED STATES held their annual convention in Salt Lake City the latter part of June.

MEETING OF IOWA COUNTY ATTORNEYS. — The annual meeting of the County Attorneys' Association of Iowa was held in Oskaloosa on June 28 and 29.

PENNSYLVANIA JUDGE NAMED. — John M. Gest, of Philadelphia, has been appointed judge of the Orphans' Court in Philadelphia, to succeed Clement B. Penrose, resigned.

THE TEXAS STATE BAR ASSOCIATION held its annual meeting at Waco, on July 4 and 5. A detailed account of the meeting will appear in our next issue.

THE ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION will be held on August 29, 30, and 31, at Boston, and not at Chicago, as erroneously stated in the June number of LAW NOTES.

IOWA JUDGE APPOINTED. — Thomas A. Arthur of Logan, Harrison county, Ia., has been appointed district judge of the Fifteenth Judicial District, of Iowa, to succeed Congressman-elect W. H. Green.

THE WEST VIRGINIA STATE BAR ASSOCIATION held its annual convention at White Sulphur Springs, W. Va., on July 12 and 13. Details of the meeting will be given in the September number of LAW NOTES.

HARVARD PROFESSOR APPOINTED DEAN OF LAW SCHOOL. — Professor Austin W. Scott of the Harvard Law School has been appointed dean of the college of law, State University of Iowa. Dean Scott is but 27 years of age.

NEW TEXAS COURT. — The Seventh Court of Civil Appeals in Texas was recently organized. K. A. Graham, of Amarillo is chief justice, and J. M. Presler, of Roby, and R. Walker Hall, of Vernon, are associate justices.

THE ST. LOUIS UNIVERSITY INSTITUTE OF LAW has decided not to admit any more women as students. In explanation, it may be said that the institute is conducted by the Jesuit order, whose province it is to teach men only.

ATTORNEY-GENERAL WICKERSHAM is expected to be the principal speaker at the annual meeting of the Minnesota State Bar Association to be held in Duluth, Minn., on July 18 and 19. Full particulars of the convention will be given in our next issue.

THE WISCONSIN DISTRICT ATTORNEYS' ASSOCIATION convened in annual session at Milwaukee on July 1. The following officers were elected: President, A. H. Smith, Merrill; vice-president, Alexander Wiley, Chippewa Falls; secretary, Daniel E. McDonald, Oshkosh; treasurer, R. M. Nelson, Madison.

NEW YORK CITY JUDICIAL APPOINTMENTS. — Mayor Gaynor of New York city has appointed Magistrate Henry Steinert a justice of the Court of Special Sessions to succeed Judge William E. Wyatt. At the same time the mayor appointed John J. Freschi a city magistrate to succeed Mr. Steinert.

ADMITTED TO BAR AT SEVENTY-FOUR. — On the seventy-fourth anniversary of his birth, Professor James Hawthorne, of Oregon, has just received notification that the University of Oregon Law School has conferred on him the honorary degree of LL.B., in consequence of his admission to the bar on June 8, 1911. Professor Hawthorne became a law student at the age of 73 and now occupies a desk in the office of two of his former students.

APPOINTMENT TO NEW JERSEY BENCH. — Governor Wilson has appointed John J. White, of Atlantic City, a judge of the New Jersey Court of Errors and Appeals to succeed the late Judge

George R. Gray, of Newark. Mr. White is a graduate of the University of Pennsylvania and practised law for fifteen years in Philadelphia. Since 1901 he has been in the hotel business, and is one of the proprietors of the Hotel Marlborough-Blenheim at Atlantic City.

CHIEF JUSTICE EMERY, OF MAINE, RESIGNS. — Hon. Lucilius A. Emery, of Ellsworth, chief justice of the Supreme Judicial Court of Maine, sent his resignation to Governor Plaisted on June 28, to take effect on July 26. Chief Justice Emery gave as the reason for his retirement from the bench his advanced age and the consequent necessity that his remaining years should be devoted to less arduous labors. For a quarter of a century Chief Justice Emery rendered conspicuous service on the Supreme Bench of Maine, and for eight years stood at the head of the court.

HARVARD LAWYERS MEET. — The annual meeting of the Harvard Law School Association was held in Boston on June 27. Justice Oliver Wendell Holmes, class of '66, was chosen president of the association to succeed the late Chief Justice Fuller. Among the vice-presidents elected were Richard Olney, Governor Baldwin of Connecticut, Judge George Gray of Delaware, Judge John C. Gray of the New York Court of Appeals, Judges Hammond and Loring of the Supreme Court of Massachusetts, Judge Dodge of the United States District Court, Governor Wilson of Kentucky, Joseph B. Warner and Louis D. Brandels of Boston, and Shinichira Kurino, LL.B., '81, of Japan. Robert G. Dodge, '97, was re-elected secretary and Roger Ernst, '03, treasurer. The three members of the council chosen for a term of four years are: James Arnold Lowell and Edward K. Hall of Boston and Charles P. Howland of New York.

COLORADO STATE BAR ASSOCIATION. — The fourth annual convention of the Colorado State Bar Association was held at Colorado Springs on June 30 and July 1. The address of the president, Charles D. Hoyt, of Denver, was on the subject, "Pending Controversies over State Streams." The annual address was delivered by Frederick N. Judson, of St. Louis, his subject being "The Progress of the Law in the United States." Other addresses were as follows: "Growth of Federal Power," by former Attorney-General N. C. Miller, of Grand Junction, and "Nationalizing the Railroads," by John A. Gordon, of Denver. The election of officers resulted as follows: President, Henry C. Hall, Colorado Springs; first vice-president, N. C. Miller, Grand Junction; second vice-president, Edward S. Worrell, Jr., Denver; secretary and treasurer, William H. Wadley, Denver.

ALABAMA STATE BAR ASSOCIATION. — The programme prepared for the annual convention of the Alabama State Bar Association, held at Montgomery, on July 7, and at Jackson's Lake, on July 8, was as follows: President's address, by John London, of Birmingham; annual address, by W. A. Blount, of Pensacola, Fla., on "The Past, Present and Future Status of Employers and Employees;" paper, by Sam Will John, of Birmingham, on "Our Imperative Duty to Procure a Judicious Reform of the Judicial Procedure of the Courts of Alabama;" paper, by W. W. Lavender, of Bibb county, on "Judiciary Recall;" paper, by L. J. Bugg, of Monroeville, on "Direct Legislation and Its Operation in America;" paper, by W. W. Whiteside, on "Some Mistakes of Lawyers and Judges;" paper, by C. C. Whitson, of Talladega, on "The Subordination of the Judge to the Jury;" and paper, by Ray Rushton, of Montgomery, on "Handling the Facts."

OHIO STATE BAR ASSOCIATION. — The thirty-second annual meeting of the Ohio State Bar Association was held at Cedar Point on July 11, 12, and 13. The president's address was delivered by Allan Andrews of Hamilton. Congressman Samuel W. McCall of Massachusetts delivered the annual address, his subject being "Representative as against Direct Government." Other addresses were by James Harrington Boyd of Toledo, who spoke on "Employers' Liability," and by Stanley E. Bowdle of Cincinnati, whose subject was "The Reclamation of the Arid West, with a little of the law under which it proceeds." Justice William Z. Davis of the Supreme Court of Ohio delivered a memorial address on William H. West. The Committee on Judicial Administration and Legal Reform reported on a number of matters relating to the courts, and resolutions were adopted to be presented to the coming Constitutional Convention. The election of officers resulted as follows: President, Frederick L. Taft, Cleveland; secretary, Gilbert H. Stewart, Jr., Cincinnati; treasurer, C. R. Gilmore, Dayton.

ILLINOIS STATE BAR ASSOCIATION. — The thirty-fifth annual convention of the Illinois State Bar Association was held at Champlain on June 22 and 23. The president's address was delivered by William R. Curran. Charles J. Bonaparte, formerly Attorney-General of the United States, spoke on "Judges and Lawmakers." Other addresses were as follows: "Judicial Settlement of International Disputes," by George W. Wall; "Woman's Place at the Bar," by Mary M. Bartelme; "Oregon's Experiment in Self-Government," by Clarence T. Wilson. At the banquet which marked the close of the convention toasts were responded to as follows: "Our Guests," Charles J. Bonaparte; "The Old Time Lawyer," Harry Higbee; "The Young Lawyer," Ralph Dempsey; "The Country Lawyer," Harry I. Green; "The City Lawyer," Samuel S. Page. Horace K. Tenney, of Chicago, was elected president of the association for the ensuing year. Other officers chosen were as follows: Vice-presidents, Judge Harry Higbee, Pittsfield; William B. Fullerton, Ottawa; Joseph H. Defrees, Chicago; secretary-treasurer, John F. Voight, Mattoon.

THE ANNUAL MEETING OF THE NORTH CAROLINA BAR ASSOCIATION was held at Lake Toxaway, in Transylvania county, North Carolina, July 28–30, Hon. Charles W. Tillett, president, and Thomas W. Davis, of Wilmington, N. C., secretary-treasurer. The address of welcome was delivered by Hon. Walter E. Moore, former Speaker of the House of Representatives, of Webster, Jackson county. The response was by Hon. Francis D. Winston, ex-lieutenant-governor, of Windsor, Bertie county. The president's address was an able discussion of certain needed reforms in the courts and procedure of the State. A special committee will be appointed to report on these matters to the next meeting of the association. Hon. Thomas M. Pittman, of Henderson, Vance county, N. C., delivered an exhaustive address on the "Torrens Land Title System." A special committee will also consider and report on this subject at the next meeting. The discussions of the various committee reports were of great interest. Hon. Francis D. Winston, of Windsor, was elected president, and Thomas W. Davis, of Wilmington, was re-elected secretary-treasurer. The attendance was unusually large.

WISCONSIN STATE BAR ASSOCIATION. — The Wisconsin State Bar Association held its annual meeting at Milwaukee on June 29 and 30. The president's address, on "The Mission of the State Bar Association of Wisconsin," was delivered by M. A. Hurley, of Wausa. The annual address was delivered by Edgar A. Bancroft, of Chicago, his subject being "The Sherman Law and Recent Decisions." The other addresses were as follows: "Recent Changes in the English System of Taxation," by Chief Justice John B. Winslow of the State Supreme Court; "Edward Vernon Whiton," by A. A. Jackson, of Janesville; "The Ideal Lawyer," by Walter D. Corrigan, of Milwaukee;

"Law and Legislation," by Michael E. Dillon, of Ashland; and "The Young Lawyer," by Walter H. Bender, of Milwaukee. The association for the first time entertained women. The following were elected officers for the ensuing year: President, John M. Olin, Madison; vice-presidents, T. H. Keraney of Racine, T. W. Spence of Milwaukee, Fred Beglinge of Oshkosh, E. G. Nash of Manitowoc, J. W. Murphy of Platteville, J. E. McConnell of La Crosse, B. B. Park of Stevens Point, Spencer Haven of Hudson, J. M. Clancy of Stoughton, O. E. Clark of Appleton, George B. Hudnall of Superior, A. E. Matheson of Janesville, Martin L. Lueck of Juneau, S. H. Cady. of Green Bay, M. Barry of Phillips, G. D. Jones of Wausau, S. M. Marsh of Neillsville, Daniel H. Grady of Portage, James Wickham of Eau Claire, J. B. Fairchild of Marinette; secretary, Adolph Kanneberg, Milwaukee; treasurer, J. B. Sanborn, Madison.

PENNSYLVANIA STATE BAR ASSOCIATION. — The seventeenth annual meeting of the Pennsylvania State Bar Association was held at Bedford Springs on June 27, 28, and 29. The legislation of the preceding year was reviewed in the annual address of the president, Edwin W. Smith, of Pittsburgh, and the annual address of the association was delivered by Andrew J. Montague, former governor of Virginia, who spoke on "A More Effective Cabinet." The following papers were also read: "Delay in the Execution of Murderers," by Robert Ralston, of Philadelphia, and "The Law and Lawyers of Balzac," by John Marshall Gest, of Philadelphia. The election of officers for the ensuing year resulted as follows: President, George R. Bedford, of Wilkesbarre; secretary, Judge William H. Staake, of Philadelphia; treasurer, William Penn Lloyd, of Mechanicsburg. Vice-presidents, Paul H. Gaither, Westmoreland county; Hon. A. B. Hasseler, Lancaster county; Hugh B. Eastburn, Bucks county; William Righter Fisher, Philadelphia; Isaac Ashe, Venango county. Executive committee, Charles D. Gillespie, Allegheny; Christian H. Ruhl, Berks; Russell C. Stewart, Northampton; Andrew A. Leiser, Union; James I. Bronson, Washington; L. C. Hipple, Clinton; E. L. Whittlesey, Erie; Quincy A. Gordon, Mercer; R. Stuart Smith, Philadelphia; John H. Jordan, Bedford; George Calvert Lewis, Allegheny; J. Butler Woodward, Luzerne; H. S. Nichols, Philadelphia; Jno. M. Strong, Philadelphia; Nicholas M. Edwards, Lycoming; Roland D. Swope, Clearfield; H. Frank Eshelman, Lancaster; Harry Keller, Center; Judge Paul A. Kundle, Dauphin; John D. Dorris, Huntingdon; J. Benjamin Dimmich, Lackawanna. At the banquet which closed the meeting the retiring president, Edwin W. Smith, was toastmaster. The toasts were responded to as follows: "The United States," ex-Governor Andrew J. Montague, of Virginia; "Pennsylvania," by Hon. Hampton L. Carson; "The Judiciary," by Hon. W. U. Hensel; "The Bar," by Warren J. Seymour, Esq., and "The Junior Bar," by Samuel Scott, Esq.

DEATH OF PORTO RICO FEDERAL JUDGE. — Judge John J. Jenkins, Porto Rico federal judge, died at Chippewa Falls, Minn., on June 10. Judge Jenkins left Porto Rico April 14 last on a two months leave of absence with the hope that his health might improve at his northern home. His illness, however, developed rapidly upon his arrival, and his strength gradually failed until the end came. John J. Jenkins was born in Weymouth, Eng., Aug. 20, 1843. With his parents he came to Baraboo, Wis., in June, 1852. He attended the common schools a few terms. At 17 years of age he enlisted in Company A, Sixth Wisconsin Infantry, and served throughout the Civil War, 1861–65, in the famous Iron Brigade under General Edward S. Bragg. After the war he returned to Baraboo and served as clerk of court for Sauk county from 1867 to 1870, when he resigned, as he had studied law and was admitted to the bar. He came to Chippewa Falls in 1870 and formed a law partnership with R. D. Marshall, now Chief Justice of Wisconsin's Supreme Court. This partnership continued till 1892. In 1872 he was elected as a member of the State Assembly for Chippewa county. President Grant appointed him United States district attorney for the territory of Wyoming in March, 1876, which position he held four years, when he resigned to resume his law practice. He was elected county judge of Chippewa county and was city attorney of Chippewa Falls five years. He was elected from the tenth district of Wisconsin to the Fifty-fourth Congress in 1896 and was successively elected to the Fifty-fifth, Fifty-sixth, Fifty-seventh, Fifty-eighth, Fifty-ninth and Sixtieth Congresses, finishing a fourteen-year term in March, 1910. The last eight years of his Congressional service he was chairman of the judiciary committee of the House of Representatives. In this position he attained great influence in Congress and was recognized as a leader in shaping legislation during his incumbency. He was appointed by President Taft to the federal judgeship of Porto Rico in May, 1910, and assumed his duties June 15 following.

English Notes.

THE WIT OF MR. BIRRELL. — The numberless wise and witty sayings of Mr. Birrell in his writings, on the platforms, and in parliamentary debate have tended to throw into oblivion his brilliant *mots* when practising at the bar, of which the following, recorded some time ago in the lay press, may serve as a specimen: "If you are going to punish a man," he said, when addressing a jury for the defendant in a libel action, "if you are going to punish a man simply for having a lively fancy, I don't know where it will end." "There wouldn't be many to punish," said Mr. Justice Darling. "I don't know," rejoined Mr. Birrell, "that many judicial vacancies would be created, my Lord" — an observation which, when addressed to the brilliant author of *Scintillæ Juris*, was *ipso facto* deprived of everything that savored of bitterness.

MISTAKES OF REPORTERS. — His Honor Judge Bacon, whose wise and witty sayings on the bench gave him a reputation scarcely second to Mr. Commissioner Kerr, of the City of London Court, on one occasion, by a mistake of the reporters, was the subject of severe strictures in the press. The judge was examining a document which the reporters stated his Honor described as "cursed Hebrew." This apparent indignity to the sacred language was visited with indignant reprobation, until his Honor explained that what he did say was that the document was written in "cursive Hebrew." The late Mr. Baron Dowse, of the Irish Court of Exchequer, who, like Judge Bacon, was a renowned humorist, once stated in court that country justices might as well be asked to write a Greek ode as to state a case without assistance. It was stated in the press, and repeated in the House of Commons, that the learned baron had said that country justices might as well be asked to ride a Greek goat as to state a case without assistance. Mr. Baron Dowse took an early opportunity of correcting the error.

ANGLO-AMERICAN ARBITRATION. — Letters have been addressed by the Cobden Club to Sir Edward Grey and President Taft in support of Anglo-American arbitration. "The proposed treaty," they say in the letter to the foreign minister, "would be an inestimable security for lasting peace between the two nations, and we hail with satisfaction your testimony to the spirit of reasonableness and good will which characterizes negotiations with the United States." In the letter to President Taft the following passages occur: "You have devoted

your high authority and influence to the promotion of a measure which, under Providence, will render war between the two English-speaking nations, spread as they are over the globe, an impossibility. Your proposal to refer all differences to arbitration has found an echo on both sides of the Atlantic, and if, as we feel assured will be the case, it is ratified in a treaty wide in its terms and generous in its confidence, you will gain for yourself and your country a triumph greater and more lasting than ever was accorded to military achievement."

COMPENSATION FOR EMPLOYEE WHO DISOBEYS ORDERS. — The distinctions that are being made in workmen's compensation cases are becoming finer and finer as the construction of the statute law progresses. A case in point is M'Keown *v.* M'Murray, which came before the Court of Appeal recently. The applicant was a flagman in front of a traction engine. It was proved that it was his duty to take turns with another flagman in walking in front of the engine. When he was not engaged in that work, it was his duty to stay in the van behind the wagon attached to the engine. At a time when he ought to have been walking in front of the engine with the flag, the applicant got on to a part of the engine called the cross-bar. He had been told by the employer not to get on the engine, and it was no part of his duty to do so. Whilst he was on the cross-bar he fell, and was injured by the wheel of the engine. There was no allegation of wilful misconduct. The County Court judge held as a fact that the accident did not arise "out of" the employment, and dismissed the application. The Court of Appeals upheld this decision, pointing out that the case was indistinguishable from Brice *v.* Lloyd, 101 L. T. Rep. 472; (1909) 2 K. B. 804, in which case also a workman had been injured at a time when he was on a part of his employer's works where he was not allowed to be. The moral of these cases is that in order to entitle himself to compensation in the event of injury, the workman must strictly observe the employer's injunctions.

BEN JONSON'S INN OF COURT. — Lincoln's Inn, which was in some danger from an underground fire yesterday, bears the name of the last of the De Lacies, Earl of Lincoln, from whom it passed, nobody knows how, into the possession of the "professors of the law." It was partly built by Ben Jonson, according to Old Fuller, who says that the poet "helped in the building of the new structure at Lincoln's Inn, when, having a trowel in one hand, he had a book in his pocket." The Latin inscription on the foundation stone of the hall was humorously Englished by another poet, Sir George Rose:

"The trees of yore are seen no more;
Unshaded now the garden lies.
May the red bricks which here we fix
Be lasting as our equities.
The olden dome with musty tome
Of law and litigation suits;
In this we look for a better 'cook'
Than he who wrote the 'Institutes.'"

The allusion in "Cook" is of course to Coke. — *Westminster Gazette.*

OBJECTION TO AUTOMOBILE HORNS. — The regulations governing the use of a motor car explicitly provide for the employment of a suitable method of announcing its presence, and in almost every case of an accident one of the first questions considered is the sufficiency of the warning. A recent case, where the motorist used a spanner upon a metal bar as an alternative, illustrates both the attitude of the police towards warnings other than those of the horn, and also it indicated that motorists are beginning to find that the public now pay small regard to a sound to which they are so well accustomed. Hence the weird and blatant warnings so often heard in the roads. In this state of things the observations of the coroner at an inquest in the Lambeth Coroner's Court must cause further anxiety to every considerate driver. He is reported to have complained that horns daze pedestrians, and that their use is most undesirable. The public are alleged by him to be terrified into immobility. The statement followed, however, a case where the unfortunate victim had been run over by her first crossing the course of the car and then returning into it. The position, then, seems to be that the law calls for the use of horns or other adequate means of warning, and justices at once regard any omission to sound them as negligent. This coroner, however, regards them as most undesirable adjuncts, and makes statements which must imply that their use is calculated to do harm and to suggest negligence. In fairness to both authorities it must be admitted that the real *desideratum* is hard to find. Cars are nowadays so silent that a warning is essential. They are, moreover, so numerous that the warnings tend to become commonplace sounds to which a townsman's ear gives scant attention. The remedy appears to be that all parties, including pedestrians, should exercise more care, and that the same standard of competence should be required from every class of driver who makes use of the roads.

FORTUNE CAST UP BY SEA. — At Thorpness recently the sea revealed treasure that had been hidden for hundreds of years. As the tide ebbed the sands were found to be littered with hundreds of coins, gold, silver and bronze, dating from early Saxon times. There were also antique bronze rings and ornaments that will fetch many pounds to their fortunate finders from collectors. At the inquest, which, by the way, is invariably held on such treasure trove, it was decided that the find was not crown property, so one or two holiday makers who happened to be there will come away richer instead of poorer. About seventy miles off the coast of southern California lies the island of San Nicholas, a horrible spot, all sand and loose pumice stone. No one had landed there for years and it was always believed that it was uninhabited and uninhabitable. Imagine, therefore, the surprise of those who knew this wild and desolate spot to learn seven or eight years ago that one man had resided there for some years. He had been steadily collecting the treasures cast up by the sea from the many wrecks of vessels along the coast. He perhaps had more reason to think the sea a valuable storehouse than most people, for when he returned to civilization he brought back with him in gold and silver, both coins and bars, upward of $50,000, all picked up on the beach. Moreover he had a fine collection of antiquities which brought him a small fortune. — *London Answers.*

INFRINGEMENT OF PART OF PATENTED INVENTION. — A point of much importance to patentees with regard to the duty of the court in assessing damages in the event of infringements of patent rights was determined by the Court of Appeal, affirming the decision of Mr. Justice Eve, in the recent case of Meters Limited *v.* Metropolitan Gas Meters Limited, 104 L. T. Rep. 113. In that case parts only of a machine which were attributable to the patented inventions belonging to the plaintiffs had been infringed by the defendants. It was held by Mr. Justice Eve that the proper factor to be taken into calculation in ascertaining the damages to which the plaintiffs were entitled was not the profit only on those parts that had been infringed, but the profit on the whole machine. The loss of profit on the sale of machines manufactured and sold by the defendants, containing the parts that constituted infringements of the letters-patent of the plaintiffs, was, therefore, assessed as the damages which the latter were entitled to recover from the former. The inclusion in the defendants' machine of the infringing parts resulted in the machine itself being an infringement. The defendants' contention was that the plaintiffs were entitled to nominal dam-

ages only, because there was no inference of any damage to them by what the defendants had done, the plaintiffs' letters-patent not being in respect of the whole machine, but for something quite trivial and of small intrinsic cost, which the defendants could have omitted from the machines that they had manufactured. Had they done so, the plaintiffs could have claimed no damages whatever. In support of that contention they relied upon the decision in Clement Talbot Limited *v.* Wilson, 97 L. T. Rep. 328, 26 Rep. Pat. Cas. 467, on the ground that the patented parts in the plaintiffs' machines were analogous to the patented accessories with which the plaintiffs' motor cars were fitted in that case. The loss of profit on the sale of the patented accessories only, and not on the sale of the whole motor car, was there held to be the measure of damages. Mr. Justice Eve failed, however, to see that the court had laid down any principle which was of much assistance in the case before him. And he did not think that there was anything in common between the accessories in that case — which were of a nature capable of being applied to any motor car — and the parts embodying the devices which were the patented inventions in the present case. The principle upon which the learned judge acted was this: He ascertained, so far as upon the evidence it was possible to judge, the extent to which the trade of the plaintiffs had been interfered with by the infringements of the defendants — that was to say, the number of machines less that were sold by the plaintiffs by reason of what the defendants had done. The profit which would have been made upon each machine multiplied by that deficient number was the amount of damages assessable. The Court of Appeal were unable to see that Mr. Justice Eve had proceeded upon any erroneous principle, and consequently affirmed his decision as above mentioned. The dicta of Vice-Chancellor Page-Wood in Penn *v.* Jack, 17 L. T. Rep. 407, L. Rep. 5 Eq. 81, at p. 84, confirming what he said in Betts *v.* De Vitre, 12 L. T. Rep. 51, 34 L. J. 289, Ch., at p. 290, were cited, with approval, as accurately stating the principles which ought to govern the courts in estimating the loss which has been actually sustained by the plaintiff in a patent action by the conduct of the defendant. Even if similar results could have been attained by the defendants, by means of a slight substitution for the parts of the machine that infringed the devices comprised in the patented inventions which belonged to the plaintiffs, that would not have availed the defendants, having regard to what was said by Lord Halsbury in United Horse Shoe and Nail Company *v.* Stewart and Co., 59 L. T. Rep. 561, 13 App. Cas. 401, at p. 409. There was authority, therefore, as well as sound reason for the conclusion arrived at in the case under discussion.

Obiter Dicta.

TOOK HIS TREES? — Nashville Lumber Co. *v.* Barefield, 93 Ark. 353.

HARDLY! — "Roth was not in good standing when he fell on the ice." *Per* Brown, J., in Roth *v.* Travelers' Protective Assoc., 102 Tex. 241.

GOOD GROUND FOR A RECALL. — "The writer is himself a farmer, and has been one for more than forty years." *Per* Ross, J., in Bliss *v.* Washoe Copper Co., 186 Fed. 825.

PURELY AN ACCIDENT. — "It is possible that he told the truth, but I think that he was not aware of it." *Per* Thomas, J., *dissenting*, in Gauly *v.* Union R. Co., 125 N. Y. S. 550.

A NEW LEGAL TITLE. — In Armstrong's Nova Scotia Digest, column 629, there is a paragraph headed "Scolding Match." An examination of the case digested shows that it had to do with an altercation between two women.

THE ESSENCE OF CONGRUITY. — From the facts in the case of Lachmund *v.* Lope Sing, 54 Ore. 106, may be gleaned the interesting item that Mr. Oliver Beers, during the year 1907, was engaged in the business of growing hops.

GOATS AS FIXTURES. — In Morton Trust Co. *v.* American Salt Co., 149 Fed. Rep. 540, it is held that a flock of goats placed on land for the sole purpose of destroying the brush and weeds and keeping down the grass are "immovable by destination."

A CAPACIOUS WITNESS. — John Howard, a witness for the prosecution in State *v.* Kelleher, 224 Mo. 145, testified cheerfully on cross-examination as follows: "I generally drink about twenty-five or thirty whiskeys a day and forty or fifty beers. The night of the shooting I had drunk ten or twelve whiskeys and fourteen or fifteen bottles of Budweiser."

A PECULIAR LEGAL ANALOGY. — "The learned lord appears to have said that adultery with a different co-respondent was a different cause of action. With great respect I am not prepared to say that it is. I think that the analogy of an action of ejectment is very close." *Per* Cozens-Hardy, M. R., in Sanders *v.* Sanders, (1911) P. 104, a husband's suit for divorce.

MADE IT HOT FOR HER. — The wording of the following notice published in a Missouri paper suggests that the lady may have had good reason for leaving: "NOTICE. As Mrs. Rosa Stone has left my fireplace, I will not be responsible for any accounts she makes. — ARTHUR STONE."

BETTER KEEP AWAY! — "Some lawyers act as though they thought that because Oklahoma is a new State that they can do as they please, and that any kind of conduct will be tolerated. In this they are greatly mistaken, as some of them will discover to their sorrow, if they do not heed our admonition." *Per* Furman, P. J., in Crawford *v.* Ferguson, (Okla.) 115 Pac. Rep. 278.

EXAMPLES OF JUDICIAL ERUDITION.

"A woman is a person." *Per* O'Rear, C. J., in Carrithers *v.* Shelbyville, 104 S. W. Rep. 744.

"It would hardly be going too far to say that the court judicially knows that a Wyandot Indian is a human being. . . . The learned counsel could hardly have been serious in urging that the word Indian might have referred to a river, which he says bears that name. It would be a glaring want of judicial knowledge, in any court, to suppose that a man was indicted

for the murder of a river, or that a jury would return a verdict for manslaughter in such a case." *Per* English, C. J., in Reed *v.* State, 16 Ark. 499.

A MUCH-MIXED COURT. — "After a very careful consideration of the case, I find myself unable to agree with either the opinion of Justice Sayre or that of Justice Anderson; and, owing to the fact that a majority of the court does not agree upon either opinion as to the law, I feel constrained to give my reasons of dissent from both views. A further reason why I think it proper is that a majority of the court disagree with each of these opinions, and, if I understand it correctly, a majority of the court agree with me in dissenting from each opinion. If I am mistaken in that, it at least seems true that a majority of the court do not concur in either opinion, while all but myself agree that the judgment of the lower court should be affirmed." *Per* Evans, J., *dissenting,* in Hudgens *v.* Creola Lumber Co., 164 Ala. 561.

ENFORCING AN INJUNCTION. — A man named Deamude of Pontiac, Ill., is the owner, according to the daily press, of a donkey. It has a pair of leather lungs, much tougher and more elastic than those possessed by the ordinary ass. B. D. Wise, a neighbor, recently came into court and asked for an injunction to restrain the animal from making the evening hours hideous. He brought witnesses to show that the donkey could be heard at the distance of a mile, and that when he was not hee-hawing he was inflating his lungs and getting ready to strike a still higher note than his last. The judge who heard the case, being a kind-hearted and honest man, promptly issued an injunction restraining the animal from vexing the midnight air. The question now arises as to the proper method of enforcing the court's decree. The method is really a very simple one. All that is necessary is to tie a brick to the donkey's tail. If he cannot elevate his caudal appendage, music has no charm for him. But who is going to tie on the brick? It is a safe bet that the owner of the donkey will be perfectly willing to allow the court officers to serve the injunction on the donkey, if such a method is adopted.

A SHAME TO TAKE THE MONEY. — The following legal notice appeared in the St. Louis *Globe-Democrat* on June 25, 1911:

"NOTICE. — Maria Eva Ehreiser, wife of Joseph Ehreiser, in Pacific, Mo., died in October, 1897; no children are left of either of the Ehreisers, and I have no cousin in the name of Ehreiser, and Joseph Ehreiser has no grandchildren. Special notice — The property of Ehreisers in Pacific, Mo., is in sequestration, in confiscation, till record bear my signature, is my property after my uncle, Joseph Ehreiser died; I will not meddle with anybody if they belong to advocacy bar or civil person. My aunt, Maria Eva Ehreiser, is deceased and my uncle Ehreiser and myself in proof, and Uncle Ehreiser's dead corpse will be not for to arrest. We, the witness, of my property and several; I have no process with other folks; not more as my property; in real estate, my money and bank doing my belongings; record bear my signature. Martin Hoock, 916 Chambers st., St. Louis, Mo., nephew and heir of deceased Mrs. Ehreiser."

The correspondent to whom we are indebted for the clipping very pertinently queries whether the advertiser's curator could not sue the paper as for money had and received for publishing such rot.

THE ART OF CROSS-EXAMINATION. — In one of the municipal courts of the city of New York a few days ago, a witness, the secretary of a membership corporation, was on the stand and was under examination by the opposing counsel, who was apparently endeavoring to show that the witness was once president of the corporation and therefore conversant with certain facts. The attorney asked:

"Were you president of the corporation in 1909?"

Witness. — The books will show.

Atty. — Look at the books.

The witness proceeded to go through the minutes of the corporation, page by page, consuming about twelve minutes, the judge meanwhile evidencing some impatience at the delay. Finally the witness answered, "I can't find it."

Atty. — Were you president of the corporation in 1908?

Witness. — The books will show.

Atty. — Look at the books.

The witness again went through the minutes, this time consuming about ten minutes, and finally said, "I can't find it."

Atty. — Were you ever president of the corporation?

Witness. — No.

CHANGE OF AVENUE. — It would hardly be fair, without further information, to charge the learned justice of the peace who wrote the subjoined epistle with ignorance of the law. He doubtless meant to convey the information that no other justice had an office on the same street as his own. But let the document speaks for itself.

LEON, OKLA., 5/18, 1911.

HON. J. GRAHAM, Marietta, Okla.

DEAR SIR — Your communication at Hand & contents noted. Will say as to change of avenue For & in behalf of W. W. Draper he has never made His appearance Before my court yet his appearance is pending Sat May the 2d. then If he gives Reasons For change of avenue It will be granted him before Some other Justice agreed upon in Love Co. I have objection to His Having His cause tried at Marietta. But must Be granted in Legal course of Law With Best Regards.

I remain yours Resptly

S. W. WHITTINGTON.

WELL-MEANT PRAISE FOR AN ATTORNEY. — A few years ago an Arkansas attorney sued a railroad company for the loss of a negro girl's trunk and contents. He recovered judgment in the case and it was appealed to the Supreme Court and affirmed. The trunk and contents cost the railroad company over three hundred dollars. Later on the same negro woman built a small shanty on a town lot and insured it for $750. The shanty burned, and she employed the same attorney and sued the insurance company. On the trial it was shown that the building cost only about four hundred dollars, but the jury returned a verdict for the full amount of the policy with 6% interest and 12% penalty and attorney's fees. The suit cost the insurance company over a thousand dollars in the end. The judgment was collected something over a year ago, and the negro disappeared. A few days ago this same attorney received a letter from her enclosing a statement of facts, and, omitting the names of persons, reading as follows:

MUSKOGEE, OKLA.

HON. SIR: — I here enclose a letter for ..... He has the will of his grandfather, and the said property is quite valuable. It is now a town of about 25 or 30 thousand people. He was speaking of getting a lawyer, and you have made such a success for us I thought I would consult you for him, and feel confident you will advise him truthfully, and if you take the case in hand I know you will win. Mama and I are always telling these wild Indians about our lawyer. If you was out here, you'd rob everybody.

"WHERE a plaintiff opens a newspaper war and sues for libel when he finds he has got the worst of it, great liberality, within the bounds of legal rules, should be indulged in the admission of evidence. The defendant is entitled to prove all the facts that provoked or tended to provoke the publication of the libel, and to search the character of the plaintiff as with a lighted candle in mitigation of the damages." *Per* Bland, P. J., in Fish *v.* St. Louis County Printing & Pub. Co., 102 Mo. App. 6, 25, 74 S. W. Rep. 641.

Correspondence.

SUMMARY PUNISHMENT FOR PERJURY.

To the Editor of LAW NOTES.

SIR: In LAW NOTES for June, which I have just received, I note an article on summary conviction and punishment for perjury. It may be of interest to you to know that this question was taken up by the legislative assembly of Porto Rico at its last session and a law passed making perjury committed in open court during the trial of a case a contempt of court, and providing for a summary punishment by the judge after the offending party has been given an opportunity to make his defense. Some of our courts had already adopted the practice of treating such perjury as a contempt and imposing summary punishment, but it was thought best to have a law passed authorizing such punishment and providing the procedure. I enclose a copy of our statute on this subject.

FOSTER V. BROWN,
Attorney-General of P. R.

SAN JUAN.

CALIFORNIA ASEXUALIZATION ACT.

To the Editor of LAW NOTES.

SIR: In your issue of LAW NOTES of June, 1911, under the heading of "Indiana Sterilization Act" appears an article that is of interest to California lawyers for the reason that the legislature of this State passed a similar statute two years ago. The statute is entitled "An act to permit asexualization of inmates of the State hospitals and the California Home for the Care and Training of Feeble-minded Children, and of convicts in the State prisons." It is found in Cal. Stat. 1909, page 1093, and in full is as follows:

"Whenever in the opinion of the medical superintendent of any state hospital [for the insane] or the superintendent of the California Home for the Care and Training of Feeble-minded Children, or of the resident physician in any state prison, it would be beneficial and conducive to the benefit of the physical, mental or moral condition of any inmate of said state hospital, home, or state prison, to be asexualized, then such superintendent or resident physician shall call in consultation the general superintendent of state hospitals and the secretary of the state board of health, and they shall jointly examine into all the particulars of the case with the said superintendent or resident physician, and if in their opinion, or in the opinion of any two of them, asexualization will be beneficial to such inmate, patient or convict, they may perform the same; provided, that in the case of an inmate or convict confined in any of the state prisons of this state, such operation shall not be performed unless the said inmate or convict shall have been committed to a state prison in this or some other state or country at least two times for some sexual offense, or at least three times for any other crime, and shall have given evidence while an inmate in a state prison in this state that he is a moral and sexual pervert; and provided further, that in the case of convicts sentenced to state prison for life who exhibit continued evidence of moral and sexual depravity, the right to asexualize them, as provided in this act, shall apply, whether they have been inmates of a state prison in this or any other state or country more than one time."

Your article concludes with a promise that perhaps the constitutionality of such acts will be discussed in a future number of LAW NOTES. It is to be hoped that the proposed discussion will include the constitutionality of the California statute above quoted.

ARTHUR J. THATCHER.

EUREKA, CAL.

Law Notes

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Massachusetts Workmen's Compensation Act.

IN LAW NOTES for last May we printed the substance of the opinion of the New York Court of Appeals (*Ives* v. *South Buffalo R. Co.*, 201 N. Y. 271, 94 N. E. Rep. 431) holding the New York workmen's compensation act unconstitutional. A workmen's compensation act was passed at the recent session of the Massachusetts legislature and approved by Governor Foss on July 28. Besides being a carefully constructed piece of legislation of very great importance, it is promulgated with an indorsement of its constitutional validity by the unanimous opinion of five of the seven members of the Supreme Judicial Court of Massachusetts, the chief justice and one associate being absent. Elsewhere in this number we give a synopsis of some of the provisions of the act, and then print the opinion of the justices in full.

It is fortunate that a compensation act presenting such a radical innovation on the common law is to be given its first trial in the United States in "the centre of the factory system," that it goes into operation with the encouragement of a great court, and that some of its most important words and phrases have been repeatedly construed in a liberal and humane spirit by the learned judges of England to whose opinions the Massachusetts Supreme Judicial Court is especially accustomed to look for aid. The act provides that the decision of the industrial accident board "shall be enforceable as if it were a decree of the Superior Court," but "there shall be a right of appeal to the Supreme Judicial Court on questions of law." It is to be hoped that the courts will not have frequent occasion to speak as Mr. Justice Peckham did in *Boston & Maine R. Co.* v. *Gokey*, 210 U. S. 155, 28 S. Ct. 657, a master and servant case: "The accident occurred in 1901, and the trial resulted in a very moderate verdict, considering the injury, and at this time, nearly seven years after the injury, the plaintiff has not yet been paid the amount of his judgment." The act provides that "fees of attorneys and physicians for services under the act shall be subject to the approval of the industrial accident board." Therefore, the ambulance-chasing lawyers are not likely to get an unconscionable share of the compensation awarded to employees.

LAW NOTES for last month contained some editorial remarks about "constitutional senators" at Washington. This month the constitutional wiseacres of the Massachusetts Senate are the subject of remark near the close of the opinion of the justices given on another page.

Employee's Failure to Give Notice of Injury.

UNDER the Massachusetts act notice of the injury within six months thereof is indispensable to the maintenance of proceedings for compensation, except in case of physical or mental incapacity of the employee, or "if it be shown that the association, subscriber, or agent had knowledge of the injury." This saving clause would probably preserve *bona fide* claims in a great many instances. If any of the tens of thousands of French Canadians and other foreigners employed in Massachusetts are not advised of the right to compensation even where their injury was manifestly caused by their own want of care, and therefore neglected to give notice, perhaps the quoted provision would protect them. Still, we suppose the knowledge of a mere fellow servant in the same grade of employment would not be the knowledge of an "agent" of the employer. An interesting case of neglect due to ignorance occurred under the English workmen's compensation act and is reported in *Roles* v. *Pascall*, [1911] 1 K. B. 982, in the Court of Appeal. The English act excuses failure to give notice in six months "if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause." In the reported case the employee gave no notice because he did not know there was a statute in force. "There is no possible pretense for arguing that complete ignorance of the existence of the workmen's compensation act comes under the head of 'mistake.' The only point which might be open to argument would be that it constituted 'reasonable cause,'" said Fletcher Moulton, L. J. We suggest to our seasoned professional reader that he turn to the young man in his office who is the happy possessor of a law school diploma obtained last June, and ask him to argue the question of "reasonable cause," upon the facts and the statute as above presented, and see if he can equal or surpass the following by Buckley, L. J.:

> "To my mind 'reasonable cause' means some cause to which, as between master and servant, regard may reasonably be paid. A mistake exists when a person erroneously thinks that one state of facts exists when, in reality, another state of facts exists; this man was not in that position. He did not think that there was not such an act as the workmen's compensation act, or make any mistake as to its contents or effect. He thought nothing at all about Acts of Parliament. His condition of mind was one not of mistake, but of ignorance. Then as to 'reasonable cause.' As between master and servant, it is not reasonable to say to the master, 'You must really treat this servant leniently because he never heard of this Act of Parliament which was passed expressly for the benefit of the class of which he is one.' That is not a reasonable cause as between those two persons."

So the employee's neglect excluded him from the benefits of the act.

Certiorari from Federal Supreme Court to State Court.

IN the report of a special committee of the American Bar Association printed a month ago for submission at the meeting of the association at Boston, the committee mentioned the Ives case in the New York Court of Appeals declaring the New York workmen's compensation act unconstitutional, and then said:

"Similar acts on the subject of compensation for injuries have been passed in many of the States. One very like the New York statute has been passed in the State of Washington, and the question of its constitutionality is under advisement by the Supreme Court of that State. It seems to many counsel, learned in the law, quite probable that the decision in Washington will be the reverse of that in New York. We shall then be in the position of having the Constitution of the United States mean one thing in New York and another in Washington."

The decision in the Ives case being *against* the validity of the statute, the case could not be taken to the United States Supreme Court, because U. S. Rev. St., § 709, which is section 237 of the new Judicial Code, limits the right of review to judgments "*in favor*" of the validity of State statutes as regards the Federal Constitution. It is recommended by the committee that the section be amended by omitting the words which prevent review of a judgment adverse to the validity of a statute. One member of the committee filed a memorandum of dissent in which he said: "I hesitate at any extension of the jurisdiction of that overloaded court. I fear that the amendment proposed would add materially to the number of cases taken to that court, and that in a very large majority of them the inconvenience would outweigh the advantage." LAW NOTES suggests, as a compromise measure, that the Supreme Court be given power to issue a certiorari in the particular class of cases to which the majority of the committee wish to extend the right of review. There could then be little ground for apprehension that the court would allow itself to be overloaded with cases of only slight and local importance. The great majority of applications for certiorari under the Circuit Court of Appeals Act of 1891 are denied. But they are freely granted in cases of general importance, especially where the decisions are conflicting. We are unable to think of any reason why the States should be any more jealous of a certiorari than of a writ of error under the proposed amendment.

From England to Salt Lake City.

APPEARING in the New York newspapers May 31 was the following press dispatch from Montreal: "Among the passengers of the Dominion liner Southwark, which arrived to-day from Liverpool, was a party of one hundred Mormon converts bound to Salt Lake City. Eighty of the party were women. A few were married and brought children. Since the opening of the season two hundred and fifty Mormon converts from the British Isles passed through Montreal." At about the same time representatives of powerful religious bodies in England were beseeching Parliament to take vigorous steps toward the suppression of Mormon proselyting among the English women. And at about that date we were reading the opinion of Darling, J., in *Taylor* v. *Mark Dawson & Son, Limited,* [1911] 1 K. B. 146. That case was an information against the respondents as the owners of a certain factory "wherein one Mary Heap, a child, was allowed to clean a part of a cap-spinning machine whilst the same was in motion by the aid of steam, water, or other mechanical power," in violation of the Factory and Workshop Acts of 1901 and 1907. The stipendiary magistrate dismissed the information, being of opinion that the little girl's labor in the mill was not a breach of the act. "Children have been doing this sort of work for years," argued a K. C. for the respondent. On appeal, however, it was held that the magistrate was wrong, Mark Dawson & Son, Limited, having no right so to employ this child. "I have come to this conclusion with regret," said Darling, J., "but the case has been brought before this court, and we have no alternative but to decide it upon the plain words of the statute." It is safe to say that the Mormon elders will also regret that conclusion; for had there been an alternative the little girl and such as she, when grown up, might be the more willing to go to Salt Lake City *via* Montreal.

Women Lawyers in Georgia? Not Yet.

WE noted in last month's LAW NOTES the pendency of a bill in the Georgia legislature making women eligible for admission to the bar in that State. On August 1 the bill was defeated in the house of representatives. The Atlanta *Constitution* devoted two columns to an account of the debates. Said the reporter: "The tail of the aurora borealis, the clouds, the empyrean blue, poetry from Homer to Austin, William Shakespeare and Portia, Joe Hill Hall's whiskers, and words, words, words, figured mightily in the debate on the woman-lawyer bill in the house of representatives yesterday. . . . Every word in the English language was used in paying tributes to women, most of them over and over, and then a large number were borrowed from foreign languages. Metaphor was beaten to a frazzle, simile was worn threadbare, poetry flowed like milk and honey in the heaven described in the Old Testament, and in the end — woman lost by a vote of eighty-five to seventy-seven; the affirmative not constituting a constitutional majority." "I appeal to you as Georgians to take no step that will lower the reverence and respect men have for women," concluded Joe Hill Hall, after quoting from a woman's letter to him. "A woman lawyer! Help us to keep our girls at the fireside and let our young mothers raise, by the help of God, boys to speak and vote and live the life they would live if He had made them men; and O for a Paul to command our women to keep silence and be keepers of home!" exclaimed his silent correspondent. "Mr. Converse, of Lowndes, delivered a very serious speech in opposition to the bill, basing his position on what he termed certain relations which should exist between men and women, relations which began in the Garden of Eden." Mr. Fullbright, of Burke, spoke for the bill. "Do you think a woman should be permitted to attend court and see and hear some of the things occurring there?" asked Mr. Adams, of Hull. "I believe the average courthouse in Georgia should be as decent as any other house," replied Mr. Fullbright, which brought applause from the gallery where a score of women were among the listeners. Speaker Holder said the State recognized the right of women to earn livelihoods, and he could not see why she should be barred from an honorable profession which she

could master. She was permitted to make a living at the washtub, the sewing machine, in the mill or factory, in the schoolroom, and scores of other places. "From some of the arguments made on this floor, one could easily believe that the profession of law is low-down and dirty and dangerous to character," he said. "But I consider it fit for any woman."

Starting off with characteristic coolness and control, the speaker, like all the others, wound up in the clouds, says the reporter. Nevertheless, the woman graduate of the Atlanta Law School was voted back to the ranks of the other laywomen at the washtub, *et cetera.*

Some Judicial Views of Woman's Sphere.

NONTECHNICAL reasons for and against the admission of women to the bar appear in the opinions of judges in numerous cases of applications by women for a license to practice. "The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother," and "this is the law of the Creator," said Mr. Justice Bradley in *Bradwell* v. *Illinois,* 16 Wall. (U. S.) 130, 141. That "the laws of God, or, for those who deny his existence, the laws of nature," distinctly point in the direction indicated by Mr. Justice Bradley, has been perceived by other judges. *Matter of Kilgore,* (Pa. C. P.) 14 W. N. C. 255, *per* Ludlow, P. J. "If I dare to express my own views I would say . . . better let them [women] attend to their own business," were Chief Justice Tuck's sentiments in *In re French,* (1905) 37 N. Bruns. 359, 365. "There are many employments in life not unfit for female character. The profession of the law is surely not one of them. The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race. . . . It would be revolting to all female sense of the innocence and sanctity of their sex, shocking to men's reverence for womanhood and faith in woman, on which hinge all the better affections and humanities of life, that women should be permitted to mix professionally in all the nastiness of the world which finds its way into courts of justice," in all the nameless catalogue of indecencies which go towards filling judicial reports and which must be read for accurate knowledge of the law, and "reverence for all womanhood would suffer in the public spectacle of women so instructed and so engaged," said Chief Justice Ryan of Wisconsin. *Matter of Goodell,* 39 Wis. 232, 244–246.

Per contra: "Are we to set ourselves to the vain task of attempting to turn backward the wheel of time," and are we "to say at this time of day that a woman shall not be permitted to pursue the vocation to which her tastes lead her, and for which her studies have qualified her, to earn her bread in any respectable calling she may elect to pursue, or that the profession of the law is, of all the professions and vocations in the world, the only one from which she shall be excluded — the only tree of knowledge of which she shall not eat?" queried Thayer, P. J., in *Matter of Kilgore,* (Pa. C. P.) 14 W. N. C., 466, 470. Another judge in the same State remarked that there are inherent reasons why woman should be admitted to practice law, growing out of the necessities of her fellow-woman, and proceeded as follows: "There are cases involving questions of delicacy, in which woman would rather suffer injustice and wrong than confer with man. There are also questions touching the relations of the wife with the husband, which a wife, from motives of prudence and a sense of wifely propriety, would not communicate to a man, but about which she would feel at liberty to advise with her fellow-woman." *Per* Peirce, J., in *Matter of Kilgore,* 17 W. N. C. (Pa.) 14, 17.

One Pennsylvania judge was fearful that the advent of women to the bar would "produce an unnatural competition between the sexes, and what is worse, a condition of society wherein worthless husbands, fathers, sons, and brothers will depend upon the exertions of those who ought to receive and enjoy that protection which nature intended." *Per* Ludlow, P. J., in *Matter of Kilgore,* (Pa. C. P.) 14 W. N. C. 255, 256. But in *Matter of Kilgore,* 17 Phila. (Pa.) 615, 616, Clayton, P. J., said: "I do not apprehend much danger of the bar becoming overrun with female attorneys. If it does it will but prove that they make the best lawyers, and will show the wisdom of the rule admitting them. Lawyers of a few years' standing at the bar will be able to recall many instances in their practice where the services of a sensible female attorney would have been of great benefit to their clients." See also *Richardson's Case,* 3 Pa. Dist. 299, 301, *per* Weand, C. J.

Admission of women to the bar would tend toward "a sweeping revolution of social order," some judges have declared. *Matter of Goodell,* 39 Wis. 232, 243, *per* Ryan, C. J. But "such persons should awake from their slumbers," for "the revolution is over," and "its results exist to-day everywhere and all around us, and have existed long enough for a moral philosopher to write its history." *Per* Thayer, P. J., in *Matter of Kilgore,* (Pa. C. P.) 14 W. N. C. 466, 470.

Makers of Laws and Interpreters of Laws.

IN the course of the debate on the Arizona and New Mexico statehood resolution Senator Bailey said that as between good men in judicial offices and good men in the legislature he preferred the makers of law. "If I must choose between fools and rascals for judges," he continued, "I would prefer to have them interpret laws rather than in making laws. The greatest mischief is for a wise and upright judge to be forced to construe foolish and ill-considered legislation." The senator's notion is correct. A wise legislator may frame a statute so that a fool could not miss its meaning, but a stupid legislator can produce one that would give nervous prostration to a Solomon on the bench who attempted to construe it. Acts have been passed by the body of which Senator Bailey is a member that ought to have caused a compositor in the government printing office to rebel at his case rather than set them up. Why, it is said that a bucolic bachelor member of Congress could not even write a letter to a handsome girl in language plain enough for her father to understand without calling upon the writer for an interpretation thereof. It has become an established canon of construction in federal courts that the awkward and inartistic language common in Acts of Congress shall be smoothed out by the judges if it is humanly possible to do so. "An act to correct errors and to supply omissions" is occasionally the title of a very voluminous act. "By these and other acts several hundred errors and omissions have been corrected," we are informed in 1 Fed. St. Ann., cxxix.

The June Crop of Lawyers.

ABOUT 35,000 is the number graduated from the colleges in the United States last June. Nearly 4,000 of these were turned loose by the law schools, and many of them will have their shingles out this fall. They should bear constantly in mind that they have only just begun to study law; if their law school instruction has taught them how to study and learn law, perhaps that alone is worth all they have paid for it. Paradox, too: It is quite likely they know more law now than they will know after thirty or forty years of study; they are destined to get soundly licked at the latter date, and maybe by a youngster, as well as now. The best advice we can give the young lawyer is to read and digest every reported case in the highest court of his own State. Let him be so familiar with those cases that when a question of law is mooted his mind goes to the case in point as quickly as the young lady stenographer in the office responds with her pencil at the utterance of one of her several hundred sign words. Especially should he strive for perfection in that regard if he is, or is to be, a trial lawyer. Observe that in *Simpson* v. *Foundation Co.*, 201 N. Y. 479, 95 N. E. Rep. 10, decided three months ago, the court was able to cite — as it did cite — no less than half a dozen New York cases directly supporting the following statement, indicating a fatal error committed by the plaintiff's attorney: "Evidence that the defendant in an action for negligence was insured in a casualty company, or that the defense was conducted by an insurance company, is incompetent, and so dangerous as to require a reversal even when the court strikes it from the record and directs the jury to disregard it, unless it clearly appears that it could not have influenced the verdict." Such errors are costly in reputation and money, and can be avoided.

If the fledgling gets an appointment as assistant United States district attorney, he ought not to imagine that he is as "tough" a lawyer as Carlyle characterized Lord Coke, that he can draw out leviathan with an hook and play with him as a bird, that he can allude to a defendant's neglect to testify with sufficient directness to have it noticed by the jury and yet so covertly as to escape condemnation by an appellate court. The latter feat was attempted by an assistant district attorney in a case reported in the Federal Reporter a few months ago, and the government must stand the expense of a new trial.

State Institutions as Depositories in Bankruptcy.

A RECENT decision of the federal District Court for the Southern District of New York (*In re Bologh*, 185 Fed. Rep. 825) would seem to suggest the advisability of appointing as depositories in bankruptcy matters, under section 61 of the bankruptcy law, national banks only. It appears in that case that the Carnegie Trust Company, a New York institution, was some years ago made a depository for the funds of bankrupt estates; that in January of the present year that company failed, and that its affairs were taken possession of by the State superintendent of banks; that at that time there were, or should have been, certain bankruptcy funds in the hands of the depository. A motion was made by a receiver in bankruptcy, and also by a trustee, for an order directing the New York superintendent of banks to pay over to the receiver and trustee in bankruptcy, respectively, the moneys deposited by them in the Carnegie Trust Company as a depository in bankruptcy. It was urged that the indebtedness was entitled to priority, under section 3466 of the United States Revised Statutes, as an indebtedness due to the United States, and that the trust company from the very fact of being designated as a depository was subject to the summary order of the court as if it were a receiver. In deciding that these contentions were unsound the court, *per* Holt, D. J., said that when a trust company had ceased to conduct its business, and its property had been taken possession of by the officer who was authorized to liquidate its affairs, the court of bankruptcy could not, by summary order, direct that the bankruptcy funds deposited should be paid over. It was also held that the determination of questions relating to priority of payment was vested in the Supreme Court of the State.

In the case cited, and we presume in most cases, the fund will probably be amply protected by bonds, but these bonds are now usually given by institutions which are also subject to State control; so that failures of the kind described present the possibility of a situation involving delay, expense, and prolonged litigation; three evils, each of which should certainly be avoided in bankruptcy matters where avoidance is possible. It may be that not all of these evils can be avoided by the appointment of national banks as depositories, but some of them can; at least, the matter is worthy of consideration.

Litigiousness and the Unruly Tongue.

LITIGIOUSNESS is a characteristic vice of early settlers. Look in the first volumes of any of the State reports, and you are likely to find plenty of evidence that the inhabitants were continually suing about trifles which are seldom brought into the courts nowadays. The same spirit that enabled them to penetrate the wilderness and cope with the forests and wild beasts and savages made them contentious with each other, we suppose. Speaking of Andrew Jackson, who journeyed to Nashville in an emigrant wagon train in 1789, Prof. John Fiske says: "He seems soon to have found business enough. In the April term of 1790, out of 192 cases on the dockets of the County Court at Nashville, Jackson was employed as counsel in 42. In the year 1794, out of 397 cases he acted as counsel in 228, while at the same time he was practicing his profession in the courts of other counties. The great number of these cases is an indication of their trivial character."

Especially do the pioneers have a penchant for libel and slander suits. Taking from the shelves a few first volumes of reports at random, we find a slander case in 1 Aikens (Vt.), years 1825–1826. In Tappan (Ohio 1816–1819), the index title "Slander" yields us *seven* cases. In the very next volume, 1 Ohio (1823) *the reporter Tappan,* who was also a judge, was sued for saying of the lawyer plaintiff, "He is a d——d rascal," "an ambidexter," and some other things. Verdict against Brother Tappan for $600. In the single volume Wright (Ohio, 1831–1834), there are four libel cases and *eighteen* slander cases. The headnote in one of the latter tells us: "It is not actionable to charge a *man* with adultery, though it is to charge a *woman* with adultery, because of the tendency of such a charge to exclude her from society" — while it wouldn't (doesn't) exclude an Episcopal church warden from

fashionable society at Newport. There is a libel case in each of volumes 1 and 2 Alberta (1910).

Now pick up volumes 93 and 94 of the Northeastern Reporter, containing somewhere near one thousand of the latest cases in Massachusetts, Ohio, New York, Indiana, and Illinois. Volume 93 has no slander cases, and only one libel case, and this was a criminal prosecution for libel. In volume 94 there is not a single libel or slander case. In volumes 77 and 78 Atlantic Reporter, covering Maine, New Hampshire, Vermont, Rhode Island, Connecticut, New Jersey, Pennsylvania, Delaware, and Maryland — a thousand cases or more — there are no slander cases, and only one libel case in each volume.

MASSACHUSETTS WORKMEN'S COMPENSATION ACT.

THE act passed July 28, and noticed in our editorial comments in this number, is entitled "An Act relative to payments to employees for personal injuries received in the course of their employment and to the prevention of such injuries." It contains seventy-five sections divided into five "Parts." Part I., section 1, abrogates three common-law defenses in actions by a servant against the master, viz., the contributory negligence rule, the fellow-servant rule, and the assumption of risk rule. It is quoted in the opinion of the justices at the end of this article. From the operation of that section "actions to recover damages for personal injuries sustained by domestic servants and farm laborers" are excepted by section 2.

The New York workmen's compensation act, by the way, was limited to eight enumerated employments "hereby determined to be especially dangerous." By the Massachusetts act all are declared dangerous, in effect, except domestic service and farm labor.

And by section 3, "the provisions of section one shall not apply to actions to recover damages for personal injuries sustained by employees of a subscriber;" the latter being defined near the end of the act as "an employer who has become a member of the Massachusetts Employees' Insurance Association by paying a year's premium in advance and receiving the receipt of the association therefor, provided that the association holds a license issued by the insurance commissioner as provided in Part IV., section twelve," and further defined by the provision that "any liability insurance company authorized to do business within this commonwealth shall have the same right as the association to insure the liability to pay the compensation provided for by this act, and a policy holder of such liability company shall be regarded as a subscriber so far as applicable within the meaning of this act, and when any such company insures such payment of compensation it shall be subject to all the regulations and obligations imposed upon the association."

Thus far, then, we see that every Massachusetts employer, except employers of domestic servants and farm laborers, is deprived of the three common-law defenses in actions by his employees unless he has become a member of the insurance association or a policy holder in a liability insurance company. But if he is a member or policy holder and is sued *in an action* at common law by his employee, the three defenses remain open to him and unaffected by this act.

The rest of the act consists almost entirely of provisions designed to accomplish the substitution of *compensation* in rates and amounts specified and by means of the *quasi*-judicial machinery prescribed, in the place of *damages* recoverable in an ordinary action at law, and "compensation" is the salient word on every page of the act.

The act is impartial between employer and employee as far as a remedial act of such a nature can be made so. Thus section 5 of Part I. provides: "An employee of a subscriber [above defined] shall be held to have waived his right of action at common law to recover damages for personal injuries if he shall not have given his employer, at the time of his contract of hire, notice in writing that he claimed such right, or, if the contract of hire was made before the employer became a subscriber, if the employee shall not have given the said notice within thirty days of notice of such subscription. An employee who has given notice to his employer that he claimed his right of action at common law may waive such claim by a notice in writing which shall take effect five days after it is delivered to the employer or his agent." Then comes section 1 of Part II.: "If an employee who has not given notice of his claim of common-law rights of action as provided in Part I., section five, or who has given such notice and has waived the same, receives a personal injury arising out of and in the course of his employment, he shall be paid compensation by the association, as hereinafter provided, if his employer is a subscriber at the time of the injury." Section 2 provides: "If the employee is injured by reason of his serious and wilful misconduct, he shall not receive compensation." And section 3: "If the employee is injured by reason of the serious and wilful misconduct of a subscriber or of any person regularly intrusted with and exercising the powers of superintendence, the amounts of compensation hereinafter provided shall be doubled. In such case the subscriber shall repay to the association the extra compensation paid to the employee." Section 20 provides that "No agreement by an employee to waive his rights to compensation under this act shall be valid," and section 21 that "No payment under this act shall be assignable or subject to attachment, or be liable in any way for any debts."

The amounts to be awarded as compensation for injuries, and the persons who shall be entitled to compensation for injuries resulting in death, are specified with considerable detail. Briefly they are as follows: No compensation for incapacity for less than two weeks, except reasonable medical and hospital services and medicines. In case of injury causing death, a weekly payment to those wholly dependent upon the employee's earnings equal to one-half his average weekly wages, but not more than ten dollars nor less than four dollars a week, for a period of three hundred weeks — which is a maximum of $3,000 — partial dependents receiving a lesser amount. In cases of total incapacity, the employee is to receive a sum equal to one-half his average weekly wages for not more than five hundred weeks, maximum also $3,000, with a like maximum for partial incapacity, payments for the latter extending to not more than three hundred weeks. In case of certain specified serious injuries, amounts ranging from a total of $120 to a total of $1,000 are to be paid as additional compensation; for example, "for the loss by severance of at least one phalange of a finger, thumb, or toe, one-half the average weekly wages of the injured person, but not more than

ten dollars nor less than four dollars a week, for a period of twelve weeks."

The act provides for written notice to be given of the time, place, and cause of an injury within six months after the accident, and for the manner of serving the notice, and requires the employee to submit to an examination by a physician or surgeon if so requested by the association.

"Part III. Procedure" provides for the appointment by the governor and council of an industrial accident board of three members with salaries of $6,500 a year for the chairman and $6,000 for each of the others. The proceedings are to be "as summary as reasonably may be," and the board has power to subpœna witnesses and examine books and papers of the parties. If the association and the injured employee fail to agree as to the compensation, the board notifies them to appoint three arbitrators, one of them a member of the board. After investigation and hearing these arbitrators file their decision with the board, which is "enforceable as if it were a decree of the Superior Court," unless it is reviewed by the board on demand within seven days, in which case "there shall be a right of appeal to the Supreme Judicial Court on questions of law, and the industrial accident board may report questions of law to the Supreme Judicial Court for its determination."

"Part IV. The Massachusetts Employees' Insurance Association" creates a body corporate of that name, provides for its organization, and describes its powers. This insurance corporation consists of employers alone. It provides for mutual insurance, the fixing of premiums and payment of the same, assessments, and dividends. No policy can be issued by the association until not less than one hundred employers have subscribed, who have not less than ten thousand employees to whom the association may be bound to pay compensation. "Every subscriber shall, as soon as he secures a policy, give notice, in writing or print, to all persons under contract of hire with him that he has provided for payment to injured employees by the association," and "every subscriber shall give notice in writing or print to every person with whom he is about to enter into a contract of hire that he has provided for payment to injured employees by the association." As noticed at the beginning of this article, an employer may, at his option, procure insurance from a liability insurance company and not join the association.

The Massachusetts act above described was submitted by the State senate, before its passage, for the opinion of the justices of the Supreme Judicial Court on the following questions: "First. Is the said bill, House Document No. 2,154, in conformity with the provisions of the constitution of the Commonwealth of Massachusetts which requires that property shall not be taken from a citizen without due process of law? Second. Is the bill in conformity with the Fourteenth Amendment to the Federal Constitution?" The following answer was returned (italics ours):

To the Honorable the Senate of the Commonwealth of Massachusetts:

We have received the questions, of which a copy with the act referred to therein and the amendment adopted by the Senate is hereto annexed, and after giving to them such consideration as we have been able to give in the time at our disposal, we respectfully answer them as follows:

The questions submitted to us are important, and the proposed act involves a radical departure in the manner of dealing with actions or claims for damages for personal injuries received by employees in the course of their employment from that which has heretofore prevailed in this Commonwealth; but we think that nothing would be gained by an extended discussion, and we therefore content ourselves with stating briefly the conclusions to which we have come and our reasons therefor.

The first section of the act (Part I., § 1) provides that "In an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense:

"1. That the employee was negligent;

"2. That the injury was caused by the negligence of a fellow employee;

"3. That the employee had assumed the risk of the injury."

This section deals with actions at common law. We construe clauses 1 and 2 in their reference to negligence as meaning contributory negligence or negligence on the part of a fellow servant which falls short of the serious and wilful misconduct which under Part II., § 2, will deprive an employee of compensation. So construed we think that the section is constitutional. We neither express nor intimate any opinion whether it would be unconstitutional if otherwise construed. The rules of law relating to contributory negligence and assumption of the risk and the effect of negligence by a fellow servant were established by the courts, not by the Constitution, and the legislature may change them or do away with them altogether as defenses (as it has to some extent in the employer's act) as in its wisdom in the exercise of powers intrusted to it by the Constitution it deems will be best for the "good and welfare of this Commonwealth." See *Missouri Pacific Railway* v. *Mackey*, 127 U. S. 205; *Minnesota Iron Co.* v. *Kline*, 199 U. S. 593. The act expressly provides that it shall not apply to injuries sustained before it takes effect. If, therefore, a right of action which has accrued under existing laws for personal injuries constitutes a vested right or interest, there is nothing in the section which interferes with such rights or interests. The effect of the section is not to authorize the taking of property without due process of law, as the Court of Appeals of New York held was the case with the statute referred to in the preamble to the questions submitted to us, and which in consequence thereof was declared by that court to be unconstitutional. *Ives* v. *South Buffalo Railway*, 201 N. Y. 271. Construing the section as we do and as we think that it should be construed, it seems to us that there is nothing in it which violates any rights secured by the State or Federal Constitutions. We see nothing unconstitutional in providing, as is done in Part I., § 2, that the provisions of section 1 shall not apply to domestic servants and farm laborers; nor in providing, as is done in Part I., § 5, that the employee shall be deemed to have waived his right of action at common law if he shall not have given notice to his employer as therein provided. The effect of the provisions referred to is to leave it at the employee's option whether he will or will not waive his right of action at common law. See *Foster* v. *Morse*, 132 Mass. 354.

The rest of the act deals mainly with a scheme for providing, through the instrumentality of a corporation established for that purpose entitled the Massachusetts Employees' Insurance Association, and the subscription of employers thereto, for compensation to employees for personal injuries received by them in the course of their employment, and not due to serious and wilful misconduct on their part. *There is nothing in the act which compels an employer to become a subscriber to the association, or which compels an employee to waive his right of action at common law and accept the compensation provided for in the act. In this respect the act differs wholly, so far as the employer is concerned, from the New York statute above referred to.* By subscribing to the association an employer voluntarily agrees to be bound by the provisions of the act. The same is true of an employee who does not choose to stand upon his common-law rights. An employer who does not subscribe to the association will no longer have the right in an action by his employee against him at common law to set up the defense of contributory negligence or assumption of the risk, or to show that the injury was caused by the negligence of a fellow servant. In the case of an employee who does not accept the compensation provided for by the act and whose employer had become a subscriber to the association, an action no longer can be main-

tained for death under the employer's liability act. But these considerations do not constitute legal compulsion or a deprivation of fundamental rights. We do not deem it necessary to take up and consider in detail the numerous provisions by which the right to compensation and the amount thereof and the persons entitled thereto and the course of procedure to be followed and matters relating thereto are to be settled and determined. We assume, however, that the meaning of sections 4 and 7 of Part III. of the proposed act is that the approved agreement or decision therein mentioned is to be enforced by proper proceedings in court, and not by process to be issued by the Industrial Accident Board itself. *Taking into account the noncompulsory character of the proposed act,* we see nothing in any of these provisions which is not "in conformity with" the Fourteenth Amendment to the Federal Constitution, or which infringes upon any provision of our own constitution in regard to the taking of property "without due process of law." It is within the power of the legislature to provide that no agreement by an employee to waive his rights to compensation under the act shall be valid. See *Missouri Pacific Railway* v. *Mackey,* 127 U. S. 205; *Minnesota Iron Co.* v. *Kline,* 199 U. S. 593.

In regard to the amendment it is to be observed that no liability insurance company is obliged to insure, and that if it chooses to do so there is nothing unconstitutional in requiring that it and the policy holder shall be governed by the provisions of the act so far as applicable.

It should be noted perhaps in the interest of accuracy that there is no phrase in our constitution which in terms requires that "property shall not be taken from a citizen without due process of law." The quoted words, which we take from the first question submitted to us, are a paraphrase of what is contained in the constitution, but are not the language of the constitution itself.

We have confined ourselves to the questions submitted to us, and we answer both of them in the affirmative.

Owing to their absence from the Commonwealth, the Chief Justice and Mr. Justice Loring have taken no part in the consideration of the questions.

JAMES M. MORTON.
JOHN W. HAMMOND.
HENRY K. BRALEY.
HENRY N. SHELDON.
ARTHUR PRENTICE RUGG.

JULY 24, 1911.

CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK.

IN a praiseworthy effort to relieve confusion of terminology in negligence cases arising between master and servant, a writer in the July LAW NOTES propounds the somewhat startling theory that contributory negligence and assumption of risk are in their essence identical, and according as the standard of care may vary in differing localities or with different juries the one term should replace the other, both defining what is in substance the same conception.

The vast practical importance of a correct understanding of the true import of terms so widely employed as these warrants, it is believed, brief space for a reply to this bold hypothesis. It is not strange that overworked courts should frequently be careless in their use of legal verbiage; but it were singular indeed if all our common-law courts since the decision in *Priestley* v. *Fowler* (3 M. & W. 1), constantly struggling toward simplicity of doctrine and terminology, have persistently ignored the substantial identity of these universally prevalent doctrines. A brief reflection will show such is not the fact.

Negligence, contributory or otherwise, is inherently and necessarily tortious, a breach of a noncontractual duty. This the writer does not attempt to deny. He does question, however, the contractual nature of assumption of risk. Waiving for the moment the accuracy of this contention, the significant weakness of his argument is that, whatever the real nature of assumption of risk, it is predicated upon *performance by the servant of his full duty,* and an essential element of one doctrine, culpable neglect, is absent in the other. The case for identity would seem to need strengthening.

The most glaring *non-sequitur* to be noted by the way is the illustration employed to show the noncontractual nature of assumption of risk. If it were based on contract, says the writer, an infant could repudiate it and recover notwithstanding the doctrine. But the voidable contracts of an infant are his express contracts, not those which are implied or created by law, such as for necessaries, and the writer himself refers to assumption of risk as an "implied term" of the contract of service.

What appears to be the underlying fallacy on which identity of these doctrines is predicated is the assumption that the legal "standard of care" varies. It is manifest that the number and character of particular duties resting on the master and the servant vary with different jurisdictions, as matter of positive law, but that is beside the question. The standard of care by which the performance of a duty is to be measured, it is submitted, *never varies.* It is the care which the ordinarily prudent man, similarly situated, would exercise, and not, as the writer contends, "that degree of care customarily exercised by masters and servants in the particular locality and at the particular time of the occurrence of the injury." The courts have repeatedly and emphatically condemned custom or local usage as a test of negligence; they are sometimes admitted as evidence, but nowhere, it is believed, as material in themselves.

The writer practically refutes his own position when he says, "A determination of what it (the standard of care) consists in is properly a function of the jury." If so, it is a determination *of fact,* and no change of facts can alter a legal doctrine. They may render the one doctrine or the other inapplicable, but its nature and essence remains unchanged. The *standard,* however, as already noted, is a legal one, and the question for the jury is whether the master or the servant, as the case may be, has lived up to it. To be sure, juries in Connecticut might decide differently from juries in Colorado, on the same state of facts, but does "assumption of risk in Colorado" thereby become "contributory negligence in Connecticut"? If so, then murder in Maine may become manslaughter in Kansas, or a breach of the peace in Arizona, according to the varying standards of conduct the juries may entertain. It is immaterial whether the parties confront a jury of Indians or a jury of cockneys, the charge of the court, which defines the legal rights of the parties *in advance of the verdict,* must be the same in its exposition of legal doctrine and terms, and if counsel for defense raise the issues of contributory negligence and assumption of risk, the court, if there is the case evidence upon which reasonable men *might* find the one or the other, or both, must present them as issues and must define them as matter of law.

It is rather singular that in the attempt to merge these two concepts the fellow-servant doctrine has been entirely ignored. That doctrine manifestly does not concern itself with contributory negligence, or any standard of care, and

could not be so considered by any jury in Christendom, wherever located. It is based on the theory of an assumed risk. The facts on which this assumption rests have been vigorously assailed, and perhaps may be open to question, but the doctrine is too well established to be uprooted except by legislation. So far as the doctrine has not been superseded, it rests on this assumption. Apart from this rule, the master would be liable for the employee's negligence, on the ground of *respondeat superior*. The fellow-servant doctrine steps in and modifies this liability, without any reference whatever to any question of the conduct of the injured servant, and says that this danger was one of which the servant assumed the risk.

The purpose of this article is not wholly destructive or critical. That the doctrine of assumed risk is more or less an anomaly may be conceded, but for somewhat different reasons than those suggested.

A personal injury case by a servant against a master can only be sustained by proof of the latter's neglect of a duty toward the former, *i. e.*, negligence on the part of the master. If such negligence exist, the doctrine of assumed risk, as to that particular duty, has no application, for the servant never assumes by implication, and is not permitted to assume by express contract, the risk of the master's negligence.

If there is no negligence on the part of the master, there is no liability in any event, and the idea of assumed risk is superfluous. Such risks and dangers as are incident to the business, which the master cannot avoid by the exercise of reasonable care, he is not liable for on any common-law principle, nor, according to the recent decision on the New York workingmen's compensation act, can he be made liable under our constitutions. They are only "assumed" as all accidents (in the legal sense) are assumed, and the idea that the risk is assumed is only a roundabout way of saying that no one is responsible.

The fellow-servant doctrine would seem to be an exception, and were the declared basis of the rule the true one it would be so. It is difficult to escape the conviction, however, that the fellow-servant doctrine, if tenable at all, must find some other support. If the doctrine of *respondeat superior* would otherwise apply, and the master would be liable for the servant's negligence, the same rule of public policy that prevents a voluntary assumption of risks of the master's negligence should prevent it in this case. If the basis of the fellow-servant doctrine is a voluntary assumption of the risk, it is the only instance where a contract exempting one from the consequences of his negligence or that of his servants or agents is upheld, and that, too, where the contract has to be implied in the very teeth of facts. Of course, if the negligence of the servant is not the negligence of the master, the fellow-servant doctrine, like other elements of the doctrine of assumed risk, is a superfluity, as there is nothing to base an action on.

An examination of the early cases, in which the rationale of the fellow-servant doctrine is expounded, particularly the leading case of *Priestley* v. *Fowler*, shows that the courts were primarily moved by considerations of public policy, and that the theory of an "assumed risk" was a convenient fiction seized upon to avoid the charge so likely to be made when the courts venture on grounds of public policy, that of judicial legislation. The basis of the doctrine appears to be the conviction that a master has a much more restricted control over his servants in their relations among themselves than with third parties, and that to impose liability upon him for their negligent wrongs toward each other would be imposing too heavy a burden upon industry. It is significant that this doctrine sprang up and was eagerly grasped in a period when industry needed encouragement, and at the present time, when the effort is to curb and restrain industry in numerous directions, it is being bitterly and quite generally attacked.

To sum up, contributory negligence as a legal doctrine has nothing in common with assumption of risk; it is a general doctrine applicable in all negligence cases, wherever one owes a noncontractual duty to another. It may become superfluous in a case where there is no negligence on the part of the defendant, but as that question must be determined by the jury, the issue of contributory negligence must be presented to them and defined.

Assumption of risk, on the other hand, considered as a legal concept, is free from any element of negligence; but practically is only another way of stating that the danger in question is one for which the master is not liable because he could not prevent it by the exercise of reasonable care.

FRED F. LAWRENCE.

SOME "PAST PERFORMANCES."

HERE are some statistics gathered from volumes 29 and 30 of the Supreme Court Reporter, which cover approximately seven volumes of the official reports, 211–217 U. S.

As a general rule, the party defeated in a United States Circuit Court of Appeals dies hard. Luckily the Constitution provides for only "one Supreme Court." Otherwise, disappointed malefactor litigants of great wealth, for example, would probably beseech Congress to create at least two, one of them a Supreme Court "in common form" and the other "in solemn form" — phrases familiar to probate lawyers; and then perhaps two more, viz., one "Solemn" Supreme Court with an unprintable intensive adjective, the other "Solemn" with a profane superlative — if we assume that litigants of the class described would be willing to patronize a court of such designation.

Suppose the decision of the Circuit Court of Appeals in a given case is final under the provision in section 6 of the Evarts Act of 1891, which is now section 128 of the Judicial Code, and the aggrieved party applies to the Supreme Court for a writ of certiorari under the provision in the same section of the Evarts Act which is now section 240 of the Judicial Code. What are his chances of getting the writ? In the first place, about five out of six applications for certiorari are denied. We happen to be able to give our readers some further and perhaps useful information not derived solely from examination of volumes 29 and 30 of the Supreme Court Reporter; we have read *all* of the certiorari cases reported since the enactment of the Circuit Court of Appeals Act of 1891, having scanned page by page every volume of the reports covering that period. Including a dozen bankruptcy cases, 260 cases have been actually heard and decided by the Supreme Court on certiorari granted by that court.

Classifying the cases where the writ was granted, we find that the cases decided in the Circuit Court of Appeals by a divided court constitute by far the most numerous class. There were fifty of them. There were eleven cases of acknowledged "importance" for various reasons, seven cases involving questions upon which the decisions of Circuit Courts of Appeals were conflicting (not including some of the sixteen patent cases), seventeen cases involving questions of original federal jurisdiction, five as to jurisdiction of the Circuit Court of Appeals in the instant case, fifteen customs duties cases, nine criminal cases, seven construing the Harter Act of 1893 — leaving about one hundred and thirty that a reader cannot confidently classify as to the grounds upon which certiorari was probably granted.

What are the chances of getting a Circuit Court of Appeals reversed on certiorari? They are very decidedly better than the chances on a plain appeal or writ of error; naturally so, for the certiorari cases that come to a hearing are those that have already got a sort of *prima facie* standing in favor of the petitioner by reason of the court's granting of the writ upon some consideration. But the figures we shall presently give are not significant for or against any particular circuit of the Circuit Courts of Appeals. The personnel of those courts is always changing more or less, and besides the ablest court may be exceptionally embarrassed by pressure of judicial business. In the two volumes of the Reporter (29 and 30 S. Ct.) the table of certiorari cases shows the following: First Circuit, one affirmed, one reversed; Second Circuit, three affirmed, two reversed; Third Circuit, two affirmed, two reversed; Fourth Circuit, one affirmed, two reversed; Fifth Circuit, two affirmed, three reversed, one modified; Sixth Circuit, four affirmed, one reversed, one modified; Seventh Circuit, one affirmed, one reversed; Eighth Circuit, two affirmed, two reversed; Ninth Circuit, two affirmed. Total, eighteen affirmed, fourteen reversed, two modified.

Disposition of cases coming from the Circuit Courts of Appeals on appeals or writs of error in the same period, omitting memorandum cases and cases dismissed after hearing, appears as follows: First Circuit, one reversed; Second Circuit, four affirmed, one reversed; Third Circuit, one reversed; Fourth Circuit, one reversed; Fifth Circuit, four affirmed, one reversed; Sixth Circuit, two affirmed; Seventh Circuit, three affirmed, one reversed; Eighth Circuit, three affirmed; Ninth Circuit, two reversed. Total, sixteen affirmed, five reversed.

C. C. M.

NUISANCE CAUSED BY DEMOLISHING BUILDING.

A DECISION of great importance to all owners of house property in congested areas has recently been pronounced by Mr. Justice Parker in Ffoulkes *v.* Salisbury-Jones *et al.* The facts were extremely simple. The plaintiff, a lessee of a London house, sued the defendants, who were respectively the owner and a builder of an adjoining house. The plaintiff complained that the defendants in demolishing the building as a preparation for extensions were interfering with her enjoyment of her own house through the dust and *débris* created and distributed by them. She formulated her claim for injunction and damages on two chief grounds. First, it was urged that no notice had been given, as required by the London Building Act; and, secondly, on the broad consideration of nuisance. The first ground may be dismissed briefly, for, although Mr. Justice Parker concluded that the Act had not been complied with in its integrity, the learned judge thought that the noncompliance was not such as would justify him giving damages. On the ground, however, that the defendants had not exercised proper precautions to protect the plaintiff from dust and *débris*, and had by their negligence in this particular evidenced a want of reasonable skill and care, Mr. Justice Parker held that the plaintiff was entitled to damages and costs. In these cases the lawyer always turns at once to Harrison *v.* Southwark and Vauxhall Water Company (64 L. T. Rep. 864; (1891) 2 Ch. 408), where Lord Justice Vaughan Williams (then a judge of first instance) considered at some length, in the course of a case where a statutory company was causing annoyance by its operations, the precise point now in issue. The learned judge (p. 865) is reported to have said: "It frequently happens that the owners or occupiers of land cause, in the execution of lawful works in the ordinary user of the land, a considerable amount of temporary annoyance to their neighbors, but they are not necessarily on that account held to be guilty of causing an unlawful nuisance. The business of life could not be carried on if it were so. For instance, a man who pulls down his house for the purpose of building a new one, no doubt causes considerable inconvenience to his next-door neighbors during the process of demolition; but he is not responsible as for a nuisance *if he uses all reasonable skill and care to avoid annoyance to his neighbor* by the work of demolition. Nor is he liable to an action even though the noise and dust and the consequent annoyance be such as would constitute a nuisance if the same, instead of being created for the purpose of demolition of the house, had been created in sheer wantonness or in the execution of works for a purpose involving a permanent continuance of the noise and dust." Mr. Justice Parker's decision emphasizes the condition introduced by the words set out above in italics. It is vital to the decision to determine whether that "reasonable skill and care" have been displayed. In the case under comment, the defendants, like so many other builders and owners, had ignored the main consideration, and were relying too strongly on the much-advanced phrase in which the necessities of the "business of life" are indicated. The decision, being one of so important a character to all residents in towns, should be kept in mind for use where the facts are similar; but it may possibly be asked whether the principle enunciated in it is not capable of further extension, and if a plaintiff, in an area where (say) the disturbance caused by his neighbor's dog cannot be dealt with under by-laws or other such simple methods of procedure, cannot bring effective pressure to bear by showing that the neighbor had not used "all reasonable skill and care to avoid annoyance" either by keeping the dog indoors or by lodging it in some more distant portion of his premises or otherwise. There are plenty of persons whose amenities are as much prejudiced by noise as were those of the plaintiff by the dust created in the demolition of a house.

THE USELESS GRAND JURY.

In the organization of a court in each county, with jurisdiction to try those accused of violating the law, and more than one, if necessary, I have mentioned the summoning of a grand jury. But I want to say, frankly, that I regard a grand jury as a useless, expensive, and unnecessary piece of legal machinery, and, while I would not yet be in favor of its abolishment, I would favor such changes in the organic law as would authorize all offenses to be prosecuted either by indictment or information. Power could be given the trial judges to summon grand juries, by orders to that effect, entered on the minutes of their

courts, when, in their opinion, the public interests required it. With the right kind of prosecuting officers such orders would very seldom be necessary.

Of course, we would no longer have the impressive sight of a grand jury returning a paper into court reciting that they were good and lawful men, duly impaneled, sworn and charged, contrasting their righteousness with the wicked conduct of the defendant, but all this could be dispensed with. The grand juries of Texas probably cost the various counties from $100,000 to $200,000 a year. The defendant is entitled to know, in plain terms, the offense with which he is charged, and this can just as well be done by a paper, signed by the prosecuting attorney, who is acting under his official oath, as by a paper signed by a foreman of a grand jury, who is acting under his official oath. There is no need or use in taking twelve men from their homes and business, and in paying them to do the work that one man can do just as well. — *From an address before the Texas Bar Association, by H. N. Atkinson of Houston.*

Cases of Interest.

VALIDITY OF STATUTE CONCERNING ABANDONED FUNDS IN SAVINGS BANKS. — In Provident Institution for Savings *v.* Malone, 31 U. S. Sup. Ct. Rep. 661, the United States Supreme Court affirmed a judgment of the Supreme Judicial Court of Massachusetts upholding the constitutionality of a Massachusetts statute providing that deposits in savings banks which had remained inactive and unclaimed for thirty years, and where the claimant was unknown or the depositor could not be found, should be paid to the treasurer and receiver general of the State. Mr. Justice Lamar, delivering the opinion of the court, said: "The statute here is reasonable in its terms and is so framed as to work injustice to no one. It only applies to cases where no deposit has been made, no interest added on pass book, no check drawn against the account, for thirty years, and where no claimant is known, and the depositor cannot be found. Before the money can be turned over to the receiver general, proceedings must be instituted in the Probate Court, and, under the decision of the Supreme Court of the State, personal notice must be given to the bank, and citation and notice, usual in the Probate Court, published, so as to give the depositor, if living, and his heirs, if dead, opportunity to appear and be heard. Even then the property is not escheated, but deposited with the treasurer, to hold as trustee for the owner or his legal representatives, to whom it is payable when they establish their right. It is true that the rate of interest paid by the State is not the same as that paid by the bank; as to sums under $1,600 it is less, and as to those over $1,600 it is more. But this is a matter with which the plaintiff in error is not concerned, and can arise only between the State and the claimant when he asserts a right to property long neglected and apparently abandoned. . . . There is nothing unequal or discriminatory in making the act applicable only to abandoned deposits in a savings bank. The classification is reasonable. Deposits in savings banks are made in expectation that they may remain much longer uncalled for than is usual in deposits in other banks. This fact makes savings deposits all the more likely to be forgotten and abandoned. And as the depositors are often wage-earners, moving from place to place, there is special reason for intervening to protect their interest in this class of property in banks as to which the State's supervisory power is constantly exercised."

VALIDITY OF ORDINANCE PROHIBITING ADVERTISING SIGNS ON VEHICLES. — In Fifth Ave. Coach Co. *v.* New York, 31 U. S. Sup. Ct. Rep. 709, the United States Supreme Court upheld the constitutionality of a New York city ordinance which provided as follows: "No advertising trucks, vans, or wagons shall be allowed in the streets of the borough of Manhattan, under a penalty of ten dollars for each offense. Nothing herein contained shall prevent the putting of business notices upon ordinary business wagons, so long as such wagons are engaged in the usual business or regular work of the owner, and not used merely or mainly for advertising." The action originated in the New York courts and was brought by the Fifth Avenue Coach Company which operated automobile stages on Fifth avenue in New York city for the carriage of passengers, the exterior of which stages was used for the display of advertising signs in violation of the ordinance, against the city of New York to enjoin it from enforcing the ordinance. An injunction was refused in the New York courts, and their judgment was affirmed by the United States Supreme Court, which held that the ordinance was a valid exercise of the police power and neither deprived the plaintiff of its property without due process of law nor denied it the equal protection of the laws. As to the contention of the plaintiff that the ordinance was not properly passed in the exercise of the police power, the court said: "The density of the traffic on Fifth avenue we might take judicial notice of, but it is represented to us as a fact by the Court of Appeals, and we find from the opinion of the trial court and the exhibits in the record, that 'the signs advertised in various glaring colors and appropriate legends divers articles;' for example, Duke's Mixture Smoking Tobacco, Bull Durham Smoking Tobacco, and Helmar Turkish Cigarettes. There were painted figures of animals, men in oriental costume, busts of men and women, all made conspicuous by contrasted coloring. Describing the signs the court said: 'The colors used — green, dark blue, white, light blue, yellow, drab, and various brilliant shades of red — are contrasted so as to attract attention, and are not blended so as to produce a harmonious or an artistic effect, and the resulting painting constitutes a disfigurement rather than an ornament.' 58 Misc. 405, 111 N. Y. Supp. 759. If plaintiff be right, however the advertisements may be displayed is immaterial. There can be no limitation of rights by degrees of the grotesque. If such rights exist in plaintiff, they exist in all wagon owners, and there might be such a fantastic panorama on the streets of New York that objection to it could not be said to have prompting only in an exaggerated æsthetic sense. That rights may not be pushed to such extreme does not help plaintiff. Its rights are not greater because others may not exercise theirs." As to the contention of the plaintiff that the ordinance denied the equal protection of the laws the court said: "To support the contention it is urged that 'no advertising wagons' are allowed in the streets, but 'ordinary business wagons' when engaged in the usual business or work of the owner, and not used merely or mainly for advertising, are permitted to exhibit 'business notices.' It is argued that the ordinance 'thus creates a favored subclass of vehicles which are permitted to display advertisements.' In view of the power of the State, and the city acting with the authority of the State, to classify the objects of legislation, we will not discuss the contention. The distinction between business wagons and those used for advertising purposes has a proper relation to the purpose of the ordinance, and is not an illegal discrimination."

POWER OF CONGRESS TO IMPOSE TERMS UPON ADMISSION OF NEW STATE. — In Coyle *v.* Smith, 31 U. S. Sup. Ct. Rep. 688, it was held (Justices McKenna and Holmes dissenting) that Congress could not, as a condition to the admission of the Territory of Oklahoma as a new State, constitutionally suspend its powers for a definite time in respect to the location of its seat of government. The court said: "The power to locate its own seat of government, and to determine when and how it

shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly State powers. That one of the original thirteen States could now be shorn of such powers by an Act of Congress would not be for a moment entertained. The question, then, comes to this: Can a State be placed upon a plane of inequality with its sister States in the Union if the Congress chooses to impose conditions which so operate, at the time of its admission? The argument is, that while Congress may not deprive a State of any power which it possesses, it may, as a condition to the admission of a new State, constitutionally restrict its authority, to the extent, at least, of suspending its powers for a definite time in respect to the location of its seat of government. This contention is predicated upon the constitutional power of admitting new States to this Union, and the constitutional duty of guaranteeing to 'every State in this Union a republican form of government.' The position of counsel for the plaintiff in error is substantially this: That the power of Congress to admit new States, and to determine whether or not its fundamental law is republican in form, are political powers, and, as such, uncontrollable by the courts. That Congress may, in the exercise of such power, impose terms and conditions upon the admission of the proposed new State, which, if accepted, will be obligatory, although they operate to deprive the State of powers which it would otherwise possess, and, therefore, not admitted upon 'an equal footing with the original States.' The power of Congress in respect to the admission of new States is found in the third section of the fourth article of the Constitution. That provision is that 'new States may be admitted by the Congress into this Union.' The only expressed restriction upon this power is that no new State shall be formed within the jurisdiction of any other State, nor by the junction of two or more States or parts of States, without the consent of such States, as well as of the Congress. . . . 'This Union' was and is a union of States, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an Act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new States, enlarged or restricted by the conditions imposed upon new States by its own legislation admitting them into the Union; and, second, that such new States might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission. The argument that Congress derives from the duty of 'guaranteeing to each State in this Union a republican form of government,' power to impose restrictions upon a new State which deprive it of equality with other members of the Union, has no merit. It may imply the duty of such new State to provide itself with such State government, and impose upon Congress the duty of seeing that such form is not changed to one anti-republican — Minor *v.* Happersett, 21 Wall. 162, 174, 22 L. ed. 627, 630 — but it obviously does not confer power to admit a new State which shall be any less a State than those which compose the Union."

PHILIPPINE ISLANDS NOT "ANOTHER COUNTRY." — In Faber *v.* U. S., 31 U. S. Sup. Ct. Rep. 659, it was held that the Philippine Islands were not "another country" within the meaning of the eighth article of the Cuban treaty, providing that the rates therein granted should continue "preferential in respect to all like imports from other countries." The court said: "This treaty was signed and proclaimed several years after it had been decided, in the Insular Cases, that Porto Rico and the Philippine Islands were not foreign countries, but territory of the United States, subject to such laws as Congress might enact for their political and fiscal management. In 1901 this court, in Fourteen Diamond Rings *v.* United States, 183 U. S. 177, 46 L. ed. 141, 22 Sup. Ct. Rep. 59, said that 'the theory that a country remains foreign with respect to the tariff laws, until Congress has acted by embracing it within the customs union, presupposes that a country may be domestic for one purpose and foreign for another.' . . . There have been statutes in which the language indicated an intent to make a distinction between a country and its colonies. But, in the absence of some qualifying phrase, 'the word "country" in the revenue laws of the United States has always been construed to embrace all the possessions of a foreign state, however widely separated, which are subject to the same supreme executive and legislative control.' Stairs *v.* Peaslee, 18 How. 521, 526, 15 L. ed. 474, 476. If, therefore, in our revenue laws, a colony is treated as a part of the country to which it belongs, the Philippine Islands must be treated as a part of this nation, and not as another country. It must be presumed that the words 'other country' in the Cuban treaty were used according to their known and established interpretation, and did not refer to charges on shipments from territory belonging to the United States."

LIABILITY OF MASTER FOR INJURY SUSTAINED BY SERVANT WHILE ENGAGED IN VIOLATING A PENAL LAW. — In Hughes *v.* Atlanta Steel Co., (Ga.) 71 S. E. Rep. 728, it was held that a servant who was injured by the negligent conduct of an incompetent fellow servant, the incompetency being unknown to him, might recover from the common master damages arising from his breach of duty in knowingly employing and retaining the incompetent servant, although the proof showed that at the time of the injury the plaintiff, the negligent and incompetent fellow servant, and the master were all three engaged together in the violation of a statute of the State making penal the pursuit of one's business or work of ordinary calling on the Lord's Day. In so holding the court said that the ruling in the cases of Wallace *v.* Cannon, 38 Ga. 199; Martin *v.* Wallace, 40 Ga. 52, and Redd *v.* Muscogee R. Co., 48 Ga. 102, that where two or more persons are engaged in the same transaction, which is in violation of a penal statute, and one of them is injured by the carelessness or negligence of the other, the injured person is without remedy, should be modified, with the qualification that to prevent a recovery, the violation of the penal statute must be a contributory cause of the injury. The court said: "A servant who is required to report for work on Sunday, and while working on that day is injured, may not be able to recover for services rendered on the faith of the contract; but he is not for that reason to be physically disabled by a negligent master, and denied a recovery for his injury solely because the injury happened while he and the master were working on Sunday. Persons who are fellow servants of a master do not cease to be such because the work on which they were employed at the time of the injury was being done on the Sabbath and the work was in violation of the Sunday law. An employee of an industrial corporation is engaged in the primary work of earning his wage, and ought not to be placed at the master's mercy because the master conducts his work on Sunday as well as week days. A compositor in a printing office, who sets the type from which a criminal libel is printed by his master, ought not to be denied a recovery for an injury sustained by him from the master's negligence while engaged in setting the type. The true rule is that a master who negligently injures his servant while working on the Lord's Day is liable to the injured

servant, notwithstanding that at the time of the injury both may have been violating the Sunday law."

LIABILITY OF MASTER FOR NEGLIGENCE OF EMPLOYEE IN DRESSING WOUND OF ANOTHER EMPLOYEE. — In Croghan *v.* Schwarzenbach, (N. J.) 79 Atl. Rep. 1027, which was an action for damages by a servant against his master, it appeared that the defendant's agent told an employee of the defendant to wash the bleeding finger of another employee, and also told him to look for bandages in a medicine chest containing medicine for first aid for persons injured in the factory, and the employee so directed negligently used the contents of a bottle of carbolic acid in dressing the wound, by reason of which the finger was gangrened and had to be amputated. On these facts it was held that a jury could infer that the use of a medicine found within the medicine chest was within the authority given by the defendant's agent to the employee to dress the wounded finger, and that a judgment for the plaintiff should be affirmed.

WHAT IS HABITUAL DRUNKENNESS ENTITLING WOMAN TO DIVORCE. — In Tarrant *v.* Tarrant, (Mo.) 137 S. W. Rep. 56, a divorce was granted to a woman on account of the habitual drunkenness of her husband for one year. As to whether the evidence taken sufficiently showed habitual drunkenness on the part of the husband the court said: "We have carefully read and considered all the evidence, and we deem it quite conclusive that for the statutory period defendant had a fixed and irresistible habit of drunkenness, having by frequent indulgence lost the power or will to control his appetite for intoxicating liquors. This was sufficient to justify the decree. It was not necessary, to sustain the charge, that it be shown that defendant was continually intoxicated, or that he had a habit of getting drunk during the usual business hours of the day, or that his drunkenness incapacitated him to perform the duties of his profession or business. 'A man may be an habitual drunkard, and yet be sober for days and weeks together.' He may be an habitual drunkard, and yet be sober during business hours."

ASSIGNMENT OF INSURANCE POLICY TO WIFE AS FRAUDULENT CONVEYANCE. — In Lytle *v.* Baldinger, (Ohio) 95 N. E. Rep. 389, it was held that a transfer by an insolvent husband to his wife of a policy of insurance then in force on his life was not an assignment of property in fraud of his creditors or to hinder or defraud creditors within the contemplation of the Ohio statutes prohibiting fraudulent conveyances. The reasoning of the court in reaching the decision was as follows: "There is no provision requiring the debtor to keep that policy in force or to pay any further premiums thereon. The creditor cannot reach the policy by any process of law. It would only become available to his estate upon the death of the insured, then, of course, it would be applicable to the payment of his debts. But the possibilities of it ever becoming assets of his estate are so remote and so dependent entirely upon the will and the pleasure of the debtor, and not upon any legal obligation that he owes to his creditors to keep the insurance in force until his death, that the assignment of the same to his wife cannot be held to be an assignment in fraud of creditors, nor could such assignment in any way, manner, or form hinder or delay his creditors in the collection of their debt, for there is no process known to the law that could reach the proceeds of this policy until by the terms of the policy itself it becomes an absolute obligation on the part of the insurance company to pay. The proposition that the failure of the insured to keep this policy of insurance in force by the annual payment of dues would be in fraud of creditors, and hinder and delay creditors, is just as tenable as the proposition that they have been defrauded, hindered, and delayed by the assignment of the same to his wife."

RIGHT OF WOMAN SEDUCED TO ACTION FOR SEDUCTION. — In Oberlin *v.* Upson, (Ohio) 95 N. E. Rep. 511, it was held that a woman who had been seduced could not maintain an action for damages against her seducer for the seduction, there being no statute in Ohio permitting such an action to be maintained by the person seduced. The court said: "Under the common law of England, as it has been recognized and administered in this country, a woman cannot maintain against her seducer an action for damages arising from her own seduction. . . . The theory of the common law is that, since adultery and fornication are crimes, the woman is *particeps criminis*, and hence that she cannot be heard to complain of a wrong which she helped to produce. It may be conceded that some of the arguments adduced here might be fairly persuasive if addressed to the legislature. Indeed, in several of the States statutes have been enacted authorizing such an action; but a careful study of the decisions in those States, limiting and construing those statutes, raises a doubt whether the legislation is a real advance upon the common law. 8 Am. & Eng. Ann. Cas. 1115 note. There is, however, no such statute in this State, and the common-law rule applies."

RIGHT TO JURY DE MEDIETATE LINGUÆ. — In Wendling *v.* Commonwealth, (Ky.) 137 S. W. Rep. 205, it was held that a Kentucky statute providing that "juries *de medietate linguæ* may be directed by the court," did not require that the jury should be directed as a matter of right, but left it to the discretion of the trial court to say whether the jury should be directed. The court in reaching a decision gave this interesting account of such a jury: "The right of an alien to demand a jury *de medietate linguæ* is for the first time presented to this court for its consideration, and an examination of the published opinions of other courts discloses the fact that in very few reported opinions has it ever been considered by a court of last resort in the United States. In North Carolina, in 1825, the question was presented to the Supreme Court of that State in the case of State *v.* Antonio, reported in 11 N. C. 200, and the court denied the right of an alien to demand such a jury. In People *v.* McLean, a case decided by the Supreme Court of New York in 1807 and reported in 2 Johnson's Reports, p. 380, the trial court allowed the prisoner the privilege of a jury *de medietate linguæ*, and in a brief opinion the court said that it was proper to do so. In the case of Respublica *v.* Mesca, found in 1 Dallas' Reports, p. 73, 1 L. ed. 42, a Pennsylvania court of oyer and terminer granted the request of alien prisoners for a jury *de medietate linguæ*. In Richards *v.* Commonwealth, decided by the Supreme Court of Virginia in 1841, and reported in 11 Leigh, p. 690, the question of the right of an alien prisoner under a statute like ours to a jury *de medietate* was elaborately considered, and the court held that the right to order such a jury was within the discretion of the trial court. A jury *de medietate linguæ* is one composed half of aliens and half of denizens, and by an ancient Act of Parliament an alien might claim as a matter of right, both in civil and criminal cases, such a jury. 3 Blackstone's Commentaries, p. 361; Bouvier's Law Dictionary, tit. 'Jury;' Forsythe's History of the Law of Juries, p. 228. But it is obvious from the scanty mention of juries of this character by the common-law writers, as well as the dearth of court opinions, that the practice of allowing such a jury had grown into nonuse in England long before the establishment of this government; and the fact that a law so antiquated and obsolete should be found incorporated in the statutes of this State may well be regarded as one of the curiosities of legislation. But the section as it now stands was in the General Statutes adopted in 1873 and the Revised Statutes adopted in 1854, and seems to have been handed down from an act of legislature adopted in 1796 that may be found in 1 Littell's Laws, p. 476. It will

thus be seen that a law for which there was never any reason in the jurisprudence of the State has been retained from its earliest history in every compilation of the statutes. It stands now and has always stood apart from all other sections of the statute relating to the selection of juries, and has never had any orderly connection with the elaborate system of laws treating of this subject, that have from time to time been enacted. Not only so, but this privilege allowed aliens is, and has always been, contrary to the spirit of American institutions and the public policy of this country. No good reason can be assigned why an alien who takes up his abode with us should not be tried for an offense against our laws in the manner and form provided for the trial of other offenders, or why any privilege or preference should be extended to aliens that is not extended to citizens; and if the right to such a jury was not recognized by the statute, we would have no hesitation in denying it. But as the right to this jury is conferred alone by the statute, so by the terms of the statute the correctness of the ruling of the trial court is to be judged, as the right to demand a jury *de medietate linguæ* is not guaranteed either by the Constitution or by the common law as expressed in it. While it is true that in the early history of England a statute for the encouragement of emigration was enacted that gave to aliens the right both in civil and criminal cases to such a jury, the reasons for the adoption of this statute were local in their nature, and it is not to be considered as a part of the body of the common law brought over to this country and that yet prevails in this State."

New Books.

OIL AND GAS.

Law and Practice in Oil and Gas Cases. By V. B. Archer, of the Woods County Bar, West Virginia. Pp. lx+1060. N. H. Anderson Company, Cincinnati, Ohio.

"Litigation growing out of the production of petroleum, oil, and natural gas is peculiar in itself." Thus the author justifies the existence of the book. While accepting the author's word that there is a need for a book considering exclusively oil and gas cases, we have grave doubts as to whether the treatment of so narrow a subject demands over a thousand pages. We believe that the subject could have been fully developed in less than one-third the space that the author has seen fit to use.

Whatever the author's scheme of treatment may have been we cannot understand. The result of his labor, however, is a cross between a text book, a digest, and book of selected cases. No better description of the plan of the book can be given than to use the author's words in his explanatory remarks. He says: "Under the title of each chapter the substantive law thereof is stated, followed by citations of the cases in support thereof. Then follows an analysis of the cases, giving the points adjudicated, a statement of the facts, and the pleadings upon which the court predicated the conclusions of law. Then follows a statement of the practice, and the rights and remedies of the lessor, the lessee, or the claimant to the leasehold, or the oil and gas in place. Each chapter is divided into sections, and the cases analyzed and digested are under separate sections."

A. I. R.

"To entirely ignore the attorney of record and enter, without his consent, into secret negotiations with his client touching the management of his case, is unbecoming the dignity of the legal profession, and destructive of that courtesy which is due from one member to another." *Per* Sanderson, C. J., in Board, etc., *v.* Younger, 29 Cal. 147, 150.

News of the Profession.

THE RESIGNATION OF JUDGE MARK A. SULLIVAN as a member of the New Jersey Court of Errors and Appeals has been received by Governor Wilson.

THE VIRGINIA BAR ASSOCIATION held its annual meeting on August 8, 9, and 10, at Hot Springs, Va. Further particulars will be given in our next issue.

OLDEST PROBATE JUDGE IN COUNTRY. — Judge William W. Blodgett, of Pawtucket, R. I., is the oldest judge of probate in the United States. Judge Blodgett was eighty-seven years old on July 8, and has been judge of the Pawtucket Probate Court for forty-one years.

GOVERNOR BALDWIN, OF CONNECTICUT, has accepted an invitation to address the Missouri State Bar Association at its annual meeting at Excelsior Springs, Mo., September 23. Governor Baldwin has chosen for his subject, "The Artificiality of the Law of Evidence."

ACCORDED HIGH HONOR BY BRITISH MASONS. — Judge C. W. Aldrich, of Columbus, Ohio, has been admitted to membership in the Quatuor Coronati of London, one of the most celebrated Masonic bodies in the world. Its active membership is restricted to thirty persons.

NEW YORK LAWYER GETS GOVERNMENT POSITION. — Felix Frankfurter, of New York, an assistant United States attorney, has been selected by Secretary of War Stimson as law officer of the Bureau of Insular Affairs of the War Department at a salary of $4,500. He will succeed Paul Charlton, of Nebraska, who has been appointed judge of the United States Court at San Juan, Porto Rico.

MAINE JUDICIAL APPOINTMENTS. — William Penn Whitehouse, of Augusta, senior associate justice of the Supreme Judicial Court of Maine, has been appointed chief justice of that court to succeed Justice Emery. The governor has also appointed George M. Hanson, of Calais, associate justice of the court to fill the vacancy caused by the promotion of Justice Whitehouse.

INDIAN ADMITTED TO BAR. — Dennison Wheelock, a full-blooded Oneida Indian and graduate of Marquette University, has passed the Wisconsin bar examination, the first full-blooded Indian to win this distinction in Wisconsin. Jonas Wheelock, a relative, was for years captain of the Carlisle football team, and another relative is an Episcopal clergyman.

MASSACHUSETTS JUDICIAL APPOINTMENTS. — Governor Foss has made the following appointments to fill vacancies on the bench of the Massachusetts Superior Court: Hugo A. Dubuque, Fall River; Walter Perley Hall, Fitchburg; John B. Ratigan, Worcester; Patrick M. Keating, Boston. The governor has also appointed David Stoneman, of Boston, to be associate justice of the Dorchester District Court.

FIRST WOMAN LAWYER DIES. — Mrs. Belle A. Mansfield, the first woman ever admitted to the practice of law in the United States, died at her home in Aurora, Ill., on August 2, at the age of sixty-five years. Mrs. Mansfield was admitted to the Iowa bar in 1868, two years after she was graduated from Iowa Wesleyan University. She was widely known as an educator. At the time of her death she was the dean of the College of Arts at De Pauw University, Greencastle, Ind.

SHIFT IN ILLINOIS JUDGES. — The Illinois Supreme Court, in accordance with a new Illinois law which provides that a Circuit judge cannot be a member of the Appellate Court in the district in which he presides, has made some changes. Circuit Judge W. W. Duncan, of Marion, a member of the Fourth Illinois Appellate Court, located at Mount Vernon, has been transferred to the Northern Illinois Court at Chicago, and will

be succeeded on the Appellate bench at Mount Vernon by Judge James C. McBride, of Christian county.

PENSION FOR LAW LIBRARIAN. — The executive committee of the New York Law Institute, of which Judge E. Henry Lacombe of the United States Circuit Court of Appeals is treasurer, adopted a resolution recently allowing William H. Winters, the librarian of the institute, to retire on a pension if he wishes to. Mr. Winters has been librarian for forty years. The institute was established in 1828 by Chancellor Kent, and since 1873 has had quarters on the fourth floor of the Federal Building. The library contains among other books the private law library of Charles O'Conor.

MORE JUDGES FOR NEW YORK STATE. — Governor Dix has signed the bill providing for the election of three additional justices of the Supreme Court for the Second Judicial District of New York State, which embraces the counties of Kings, Queens, Suffolk, and Richmond. This will give the Second District a total of twenty justices. The law goes into effect at once, and three new justices will be elected in November for a period of fourteen years at a salary of $17,500 per year.

THE WASHINGTON STATE BAR ASSOCIATION held its annual meeting in Spokane, Wash., on July 27, 28, and 29. Russell L. Dunn, of San Francisco, delivered an address on "The Ownership of Property in the States by the Federal Government, whether as Sovereign or Proprietor." Fred H. Peterson made an interesting speech, his subject being the courts of Germany. The election of officers resulted as follows: W. T. Dovell, Seattle, president; C. Will Shaffer, Olympia, secretary; Arthur Remington, Olympia, treasurer.

THE MAINE STATE BAR ASSOCIATION gave a complimentary banquet on July 27 to Hon. Lucilius A. Emery, retiring chief justice of the Maine Supreme Judicial Court. Eloquent tributes to the retiring jurist were paid by Hon. William Penn Whitehouse, of Augusta, who succeeds him at the head of the Supreme bench of Maine; former United States Senator Eugene Hale, who, before Chief Justice Emery was appointed to the bench, was his law partner in Ellsworth; and Judge Clarence Hale, of the United States District Court, who studied law in Judge Emery's office.

WOMEN'S LAWS. — Mrs. Ellen Spencer Mussey, of Washington, is preparing a synopsis of State laws pertaining to women and will expound the rights of her sex under the law in the International Council of Women, which will be held in Stockholm, Sweden, in September. Mrs. Mussey is founder of the Washington College of Law, and always has taken a leading part in movements to enlarge the legal privileges of women. Recently she was elected a delegate to the international council, and her exposition of the American laws relating to women is expected to be an important part of the program.

CHICAGO LAWYER APPOINTED RUSSIAN CONSUL. — Frank A. Rockhold, senior member of the law firm of Rockhold & Busch, Chicago, has been appointed Russian consul in Chicago. The consulate is one of the most important in the United States, extending over fifteen States, from Wisconsin to Oklahoma. It has uniformly heretofore been in charge of a member of the Russian nobility. Mr. Rockhold is a graduate of the University of Michigan, and has practiced law in Chicago seventeen years. His appointment to the office comes through his acquaintance with the duties of the consulate, he having attended to its legal business for the past eight years.

AMERICAN BAR ASSOCIATION. — At the annual meeting of the American Bar Association, to be held in Boston on August 29, 30, and 31, President Farrar, of New Orleans, will make the opening address. The annual address will be delivered by William B. Hornblower, of New York. His subject will be "Anti-trust Legislation and Litigation." Ex-Judge Brown, of the United States Supreme Court, will read a paper on "The New Federal Code," and Hon. Robert S. Taylor, of Fort Wayne, will read a paper on "Equity Rules 33, 34, and 35." The annual dinner will be given at Hotel Somerset, August 31. Other entertainments will be afforded as follows: August 29, excursion to Cambridge, and reception at Harvard University; August 31, automobile drive; September 1, steamboat excursion.

APPOINTED TO REPRESENT UNITED STATES. — Judge Everett C. Bumpus, of President's Hill, Mass., at the request of President Taft and upon the recommendation of Senators Lodge and Crane and others, has been appointed by the State Department to represent the United States in the trial of water cases before the international commission appointed to regulate the boundary waters between the United States and Canada. Judge Bumpus has specialized upon the question of water rights for over twenty years, was one of the four commissioners to settle important questions in the treaty between the United States and Panama, over which a former commission had disagreed, and has been an invaluable member of numerous commissions and counsel for the State in many similar cases in all parts of New England and New York.

CHIEF JUSTICE KNOWLTON RESIGNS. — Chief Justice Marcus P. Knowlton, of the Supreme Judicial Court of Massachusetts, sent his resignation to Governor Foss on August 7. Continued ill health was given as the reason for his action. Justice Knowlton was born at Wilbraham sixty-eight years ago, and began the study of law at an early age. After preparing at Monson Academy, he entered Yale, graduating in 1860. He gained admittance to the bar at Springfield in 1862, and his rise as a lawyer was exceptionally rapid. In the early 70's he entered the political field and in 1873 was elected to the house of representatives. In 1880 and 1881 he was a State senator. Chief Justice Knowlton was appointed to a judgeship in 1881, and until 1887 was a judge in the Superior Court. He was appointed to the Supreme Court in 1887, and was a justice of that court until 1902, when he was promoted again, this time to the position of chief justice.

LAWYERS APPOINTED TO AID IN REVISION OF FEDERAL LAWS. — In compliance with the circular letter recently issued by the United States Supreme Court, the following lawyers have been appointed to receive and report suggestions for reforming the equity practice of the United States courts: Fourth Circuit — Judge L. L. Lewis, Richmond, Va.; William P. Bynum, Greensboro, N. C.; George Whitelock, Baltimore, Md. Fifth Circuit — Edward T. Merrick, New Orleans, La.; Alex. C. King, Atlanta, Ga.; Horace Stringfellow, Montgomery, Ala.; Marcellus Greene, Jackson, Miss.; W. A. Blount, Pensacola, Fla.; Horace Chilton, Dallas, Texas. Sixth Circuit — Henry M. Campbell, Detroit, Mich.; Lawrence Maxwell, Cincinnati, Ohio; J. D. Sizer, Chattanooga, Tenn.; Edmund F. Trabue, Louisville, Ky.

CONVENTION OF COMMERCIAL LAW LEAGUE. — The seventeenth annual convention of the Commercial Law League of America was held at Atlantic City, N. J., on July 18, 19, and 20. Eli H. Chandler, of Atlantic City, made the address of welcome. President A. V. Cannon, of Cleveland, Ohio, delivered the annual address. Miss N. L. Cowan, of Jacksonville, Fla., graced the convention with her presence. She is said to be the only woman commercial lawyer in the United States. The election of officers resulted as follows: President, J. Howard Reber, of Philadelphia; vice-president, John G. Landis, of St. Joseph, Mo.; secretary, Fred P. Vose, of Chicago; treasurer, W. O. Hart, of New Orleans.

TEXAS STATE BAR ASSOCIATION. — The thirtieth annual convention of the State Bar Association of Texas was held at

Waco, Texas, on July 4 and 5. The president's address was delivered by Hon. Hiram Glass, of Texarkana. The annual address, by Martin W. Littleton, of New York, was on "Structural and Economic Changes." Papers were read by Judge William Hodges, of Texarkana, on "Judicial Reform in Texas;" by H. N. Atkinson, of Houston, on "Some Results of Holding a Legal Intellect in Mortmain;" and by Ben. G. Kendall, of Waco, on "John Marshall." The following officers were elected: President, R. E. L. Sauer, Dallas; vice-president, John T. Duncan, La Grange; secretary, B. Cave, Austin; treasurer, William D. Williams, Austin; directors, W. W. Searcy, Brenham; A. D. Sanford, Waco; Marshall Spoonts, Fort Worth; W. T. Bartholomew, San Angelo; W. C. Morrow, Hillsboro.

WEST VIRGINIA BAR ASSOCIATION. — The twenty-seventh annual meeting of the West Virginia Bar Association was held at White Sulphur Springs, W. Va., on July 12 and 13. The president's address was delivered by W. W. Hughes, his subject being "The Spirit of the Times — Its Effect on Law." Other addresses were as follows: "Is There Need of Additional Judges for the Supreme Court of Appeals?" by Judge W. N. Miller; "The Judicial Code," by Judge B. F. Keller; "The Law's Delays and Its Remedies," by S. W. Walker. The following officers were elected: President — Judge B. F. Keller, Bramwell; vice-presidents — First District, H. C. Hervey, Wellsburg; Second District, Stuart W. Walker, Martinsburg; Third District, Joseph H. Gaines, Charleston; Fourth District, W. G. Peterkin, Parkersburg; Fifth District, Jean F. Smith, Huntington; secretary — Chas. McCamic, Wheeling; treasurer — Chas. A. Kreps, Parkersburg; executive council — W. P. Willey, Morgantown; Henry M. Russell, Wheeling; W. Gordon Mathews, Charleston; Wells Goodykoontz, Williamson; and B. M. Ambler, Parkersburg.

MINNESOTA STATE BAR ASSOCIATION. — The annual convention of the State Bar Association of Minnesota was held in Duluth, Minn., on July 18, 19, and 20. At the opening session President James D. Shearer, of Minneapolis, spoke on "The Trend of Modern Legislation." The annual address was delivered by Attorney-General George W. Wickersham, his subject being "What Further Regulation of Interstate Commerce Is Necessary or Desirable." A paper on "Workmen's Compensation" was read by H. V. Mercer, of Minneapolis. An open discussion of the decisions of the United States Supreme Court in the Standard Oil and Tobacco cases was led by W. A. Lancaster, of Minneapolis; J. B. Cotton, of Duluth; E. T. Young, of St. Paul; and Pierce Butler, of St. Paul. "The Recall of Judges" was discussed by John Moonan of Waseca, James Monahan of St. Paul, and John Jenswold, Jr., of Duluth. A discussion of "The Conflict between Federal and State Control of Railway Rates" was participated in by Jared How and E. S. Durment, of St. Paul.

KENTUCKY STATE BAR ASSOCIATION. — The chief feature of the tenth annual meeting of the Kentucky State Bar Association, held at Lexington, Ky., on July 12 and 13, was the annual address, which was delivered by Governor Woodrow Wilson, of New Jersey, his subject being "The Lawyer in Politics." Governor Wilson was introduced by Governor A. E. Willson of Kentucky. The address of welcome to the Bar Association was delivered by Judge Charles Kerr, and the president's address by J. D. Mocquot, of Paducah. Other addresses were as follows: "Meaning of the Decisions of the Supreme Court in the Standard Oil and American Tobacco Company Cases," by Judge A. P. Humphrey, of Louisville; "Is the Fellow-Servant Law Becoming Obsolete," by Judge J. F. Gordon, of Madisonville; "Expert Testimony," by E. J. McDermott; "Lawyers' Fees," by Judge Matt O'Doherty, of Louisville; and "The Value of Precedents," by Judge Shackelford Miller, of the Kentucky Court of Appeals. The following officers were elected: President, James B. Basket, Louisville; secretary, R. A. McDowell, Louisville; treasurer, James K. Todd, Shelbyville.

INDIANA STATE BAR ASSOCIATION. — The fourteenth annual meeting of the State Bar Association of Indiana was held on the Winona Assembly Grounds, Winona Lake, Indiana, on July 11 and 12. William A. Ketcham, of Indianapolis, Ind., the president of the association, delivered the president's address on the subject "Fundamental Law." The annual address was given by Hon. Peter W. Meldrim, of Savannah, Ga., on "Master and Servant," treating specifically employers' liability and workmen's compensation acts. Other papers were read by Timothy E. Howard, of South Bend, Ind., on "Our Charters;" Linn D. Hay, of Indianapolis, Ind., on "Making and Amending Constitutions;" and Enoch G. Hogate, of Bloomington, Ind., on "Is There a Law's Delay?" On the evening of July 11 a dinner was served at the Winona Hotel by the association for the members and their guests, and on the evening of July 12 the annual banquet was served at the same place. There was an attendance of about two hundred members. The following officers were elected: President, Samuel Parker, South Bend; vice-president, John W. Hanan, Lagrange; treasurer, Frank E. Gavin, Indianapolis; secretary, Geo. H. Batchelor, Indianapolis; executive committee, Geo. H. Gifford, Tipton; Merrill Moores, Indianapolis; Enoch G. Hogate, Bloomington.

DEATHS OF EMINENT LAWYERS AND JUDGES. — An unusual number of deaths have occurred recently among the leaders of the profession, both on the bench and at the bar. Among others, the following have been noted: William P. Frye, senior United States senator from Maine, at Lewiston, Me., on August 8; Frank A. Hooker, justice of the Supreme Court of Michigan, at Auburn, N. Y., on July 10; Edwin A. Nash, justice of the Supreme Court of New York, at Avon, N. Y., on July 23; Edward M. Shepard, noted lawyer and politician, at Lake George, N. Y., on July 28; George W. Cate, presiding justice of the Second District Court of Massachusetts, at Amesbury, Mass., on July 28; George Matthews Sharp, associate judge of the Eighth Judicial Circuit Court of Maryland, at Baltimore, Md., on July 7; Hiram S. Biggs, former judge of the Circuit Court of Indiana, at Warsaw, Ind., on July 20; W. O. Harris, former judge of the Circuit Court of Kentucky and dean of the law department of the University of Louisville, at Louisville, Ky., on July 6.

English Notes.

CRIPPEN LAWYER SUSPENDED. — Arthur Newton, the lawyer who defended Hawley H. Crippen at his trial for wife murder, has been suspended from practice for one year for professional misconduct in defending Crippen. He aided two newspapers to publish false statements about the case. Justice Darling, in announcing the decision, said that the case had been conducted largely for the purpose of making copy for the newspapers which subscribed money for the defense. That a solicitor should lend himself to such practice was a very grave offense, the justice said, and he added that in his opinion the newspapers connected with the affair deserve punishment equally with Newton.

TENURE OF OFFICE OF IRISH JUDGES. — The death of Sir John Chute Neligan, K. C., who was from 1866 till his retirement in 1908 a member of the Irish County Court bench, recalls some extraordinary instances of length of tenure of their offices by

Irish County Court judges. Sir Francis Brady, Bart., K. C., was County Court judge of Tyrone from 1861 till his death in 1909. Mr. John Richards was County Court judge of Mayo from 1859 till 1899. Mr. T. R. Henn, Q. C., was County Court judge and recorder of Galway from 1859 till 1898. The Right Hon. Sir Frederick Shaw, Bart., was recorder of Dublin from 1828 till 1876, and his immediate successor in that office, the late Right Hon. Sir Frederick Falkiner, K. C., filled it with distinction from 1876 till his retirement in 1905.

RAISING SPEED LIMIT FOR MOTORS. — Little by little it is interesting to note that the authorities are being compelled to face the facts of modern locomotion and to alter their regulations accordingly. The proposal for raising the speed limit for motors in the London County Council parks is another instance of this, and there has been the analogous case of a speed limit being raised in a rural area once subjected to the same. Eight miles an hour is a ridiculous speed for the modern motor with its ample brake power, and it is exceeded by light and brakeless dogcarts drawn by young and comparatively uncontrolled horses every day. It is further recognized that there is great confusion caused by an eight miles per hour limit in London County Council parks, and by the twelve (lately ten) miles per hour in the Royal parks. It is even more absurd to subject bicycles and tricycles to such a funereal speed. The Home Office is understood to be willing to approve the alteration.

A SPELLING MISTAKE. — The spelling of the word "skinny" was an important factor in deciding a society lawsuit recently at the Bristol Assizes. The plaintiff was a Miss Kathleen Gransmore — since married to Lieutenant Thurston, R. N. — and the defendant, Miss Mary Norrington, a young lady twenty-one years old. It was alleged that the defendant wrote a series of anonymous letters in a disguised hand to Lieutenant Thurston reflecting on Miss Gransmore's honor, and designed to prevent her marriage to the lieutenant. In one of the anonymous letters the word "skinny" was written with one "n." After emphatically denying all knowledge of the letters, Miss Norrington was asked in court to write one of the sentences appearing in the libel, and, having done so, it was found that she had spelt "skinny" with only one "n." When asked to spell "skinny" she made the same mistake. The jury found for the plaintiff, awarding her £500 damages.

INTERNATIONAL JUDICIAL SYSTEMS. — It is rather interesting to note how intimately interwoven are the two ideals of international peace and international judicial systems. Both these conceptions are at this time much in the minds of all public men. The International Prize Court advocated by the Second Hague Conference was followed by a recommendation towards the settlement of an International Court of Arbitral Justice. These would cover controversies of a justiciable character between nation and nation either in times of war or of peace. It cannot be overlooked that the bare proposal to found a tribunal to deal with questions of prizes is in one sense inimical to that relating to arbitration, for the former obviously presupposes war, whilst the latter's *raison d'être* is its avoidance. There is, however, the probability, if not the certainty, that, subject to certain amendments, the conception of internationalism will be marked by two institutions to work in the two main divisions of one nation's relations with another, and there is every reason to suppose that the exercise of the jurisdiction of the tribunal of arbitration will gradually diminish the necessity for the existence of a body founded to deal with facts less and less likely to arise. As this tendency is shown there will be a much more hopeful opportunity for a renewal of the movement towards diminished armaments. The Carnegie Endowment Fund shows that modern and organized methods of education are going to accelerate the working of men's minds. Divisions for the special research of (1) international law, (2) economics and history, and (3) intercourse and education will both widen the views of the general public and hasten the time when the intercourse of groups of people will be as friendly and as subject to the reign of law as is that between the individuals who compose such groups.

MARRIAGE OF FEMALE SCHOOL TEACHERS.— The case of Davies *v.* Elbw Vale Urban District Council, recently decided by Mr. Justice Channell, is one of very great interest, for it raises a question constantly before all those concerned in elementary school matters. Female school teachers frequently marry, and the point is often put as to whether marriage *per se* is sufficient to justify dismissal, and it is not infrequent for the prospective bride to inquire whether the managers of voluntary schools would approve of her marriage. The position is then difficult for all parties. If consent is given, unpleasantness always arises over the conflicts of duty which supervene, and still more delicate questions arise should the mistress become pregnant. The case under comment arose as between a married teacher and a Welsh local education authority. She was appointed in 1900 and married in 1901. In September, 1910, her condition was such that the education committee requested her to remain away, although her health was good and she could physically perform her duties for another three months. The child was born in January, work resumed in February, and from that date her salary had been duly paid. The local education authority refused, however, to pay between September and February. Mr. Justice Channell held that the salary must be paid, and he based his decision on the terms of the contract, which seemed to put on the teacher the loss after four weeks' illness. Was this absence caused by illness? The learned judge could not say that this was an absence reasonably arising in consequence of approaching illness, and he thought that this matter might be made a subject for express rules. It may incidentally be noted that it appeared at the trial that this knot is to be cut by employing no married women in future. This case has to be read in conjunction with the general principles to the effect that, where there is illness, the loss for temporary incapacity rests on the employer of a servant — a doctrine based on the notion that illness is not a breach of contract, but an act of God. In this case there were certain rules governing a somewhat special environment, and it may be supposed that the liability disclosed now will lead to further regulations.

THE ANTIQUITY OF THE GUILLOTINE. — The recent discovery of an engraving in the Bibliothèque Nationale of Paris of an undoubted engraving by Callot of the guillotine raises the question of the antiquity of that instrument of punishment, says *The Law Times*. M. de La Roncière, the keeper of the Department of Prints, has given a few notes to the *Petit Temps* on the subject, from which it may be assumed that in France, as in England, there is a general belief that the guillotine dates from the Revolution. But this is not so. M. de La Roncière says that in 1619 it was by no means an innovation, for it is represented in an engraving by L. Cranach. Callot, the French engraver and painter, died in 1635, and Cranach, the German, in 1553. M. de La Roncière says the first representation of the guillotine known to him is in a manuscript of the fifteenth century entitled Heures de Savoie. The first execution by the guillotine which history records took place at Genoa in the year 1507. The two ringleaders of the revolt in Genoa at that time were guillotined in the presence of Louis XII. of France. The famous Dr. Guillotine brought forward in the Constituent Assembly in 1789 a proposal that all capital punishment should be of the same kind — that is, by decapitation and by means of a machine. With this resolution Guillotine's association with the machine may be said to have ended, for some *lapsus*

linguæ on his part brought the proceedings to a close amid laughter. Dr. Antoine Louis, secretary to the Academy of Surgeons, some time later, was deputed to draw up a report on the subject, and he recommended the adoption of a machine similar to that suggested by Guillotine, but Louis ignored the doctor entirely. Experiments were made upon dead bodies, and the first execution took place in 1792, the culprits being highwaymen. The instrument was first known as *Louisette* or *La Petite Louison,* but in the same year it was referred to in print as *la guillotine,* and since then it has been known as such. The legend that Guillotine suffered death by the means he suggested has long since been abandoned, for the doctor lived until the year preceding Waterloo. It may be observed that a rude sort of guillotine is to be seen in the Antiquarian Museum of Edinburgh, and by it the Marquis of Argyll suffered in 1661, and his son, the earl, twenty-four years later. These were the last victims of the "Maiden," the name by which it was known. Halifax, in the West Riding, possessed a somewhat similar instrument known as "the gibbet."

MEDICAL EXAMINATION OF TAXICAB DRIVERS. — The announcement that the drivers of taxicabs in the metropolitan area are to be subjected on behalf of the police authorities to a rigorous medical inspection raises some points of no small importance to all parties. The public at large should certainly be protected in a reasonable manner from possibilities of accidents caused by drivers not only of taxicabs, but of every form of vehicle, and not the least so from the danger incurred by sending out horses in the "charge" of persons either too old or too young or too weak to exercise over them any effective restraint. In these matters it is always, or nearly always, a question of degree, and there is a very real danger that the zeal of the police may apply an altogether harsh standard of fitness for the holder of a license. There have been some curious revelations as to the sight tests of seamen in recent years, and the police may make some regulations which would throw out of employment numbers of men who cannot either in this or some other test conform to a standard quite beyond the necessities of the case. Should the proposal then be followed up seriously, it would be only fair to set out some limitations to the standard to be required. Furthermore, it must be remembered that in these competitive times a man rejected by the police may find himself very severely handicapped in obtaining situations in private families or elsewhere. The fear of trouble through the employ of workmen slightly below the par of commercial fitness is a very real one, and employers would think twice before taking on a man rejected by Scotland Yard. A recent catena of cases of drunkenness on the part of taxicab drivers has, however, shown that the licensing authorities might consider what course is open to them to prevent any holder of a driver's license being a person of unsatisfactory sobriety. A mechanical vehicle is wonderfully safe and reliable in the hands of a sober driver, but is peculiarly dangerous when in those of an inebriate. In all these questions a spirit of moderation is requisite, and for equity's sake it is not right to impose ever severer conditions on one type of vehicle and to exercise no effective restraint on other types. If a medical examination is really necessary either for health or sobriety, let it be applied to all and every class of driver of vehicles in respect of which the police have any *locus standi* to interfere.

PRIZE PUZZLE CASE. — In the City of London Court, last month, an interesting prize puzzle case was heard before Sir John Paget, K. C., deputy judge. Mr. James K. Pickup, solicitor, 233 Cecil-chambers, Strand, sued the Ceylon Tea Company, 67 Imperial-buildings, Ludgate-circus, for £5. Plaintiff's case was that the defendants sold him two pounds of Ceylon tea, and they offered him 100 marks (£5) on his sending them a correct solution to a puzzle advertised by them. Plaintiff sent in a correct solution and now demanded his £5. Mr. Harold Smith, M. P., appeared for the plaintiff, and Mr. J. D. Cassels for the defendants. Mr. Smith said that the action had been brought because of the principle involved rather than the money involved. A German friend sent to the plaintiff an advertisement of a prize puzzle advertised by the defendant company in Germany, solutions to which were invited by purchasers of two pounds of Ceylon tea who sent five marks. Plaintiff was struck by the great simplicity of the puzzle, and he sent the five marks and had the tea. In the puzzle a field was divided into nine smaller fields. In the middle field stood the figure 4. The puzzle consisted of placing into the other eight fields such figures that the addition of the different fields in as many straight lines as possible came to twelve. It was forbidden to use a figure which had been used in one field again in another field. Neither must any field remain blank. Plaintiff's solution was correct. When plaintiff said he had sent in a correct solution, defendants said that there were 500,000 different ways of manipulating the figures and thereby expressing the correct solution. The defendants' explanations were absurd, meaningless, and clumsy, and violated their own rules. The deputy judge said it looked like "the old game." Mr. Cassels replied that it was nothing of the sort. It was a science. The correct solution consisted of ten straight lines, and the plaintiff had sent eight straight lines. Therefore his was not the correct solution, the prize for which had gone to some one in St. Petersburg, who had had his money. It was simply an arithmetical problem. Plaintiff in evidence said he looked upon the advertisement as a *quasi*-swindle and meant to deceive the public. It should be exposed. His eight-year-old boy did it in five minutes. Defendants were seeking refuge behind fractions, such as nine-ninths and three-thirds — which were rubbish. Mr. Cassels said that the puzzle was quite fair. Defendants had combined figures. The deputy judge said he looked upon the whole thing as a fraud altogether. A witness was called for the defendants to say that nine and nine-ninths was an arithmetical form of expressing the figure 8, and was used with others in the solution. Mr. C. R. Sadler said he traded as the Ceylon Tea Company. He was an author under the name of Horace Portland and was an advertising expert. The puzzle was perfectly *bona fide*. He received in all 1,200 answers to the advertisement and £300, and he sent £12. 10*s*., one prize, and two pounds of tea to each. The deputy judge did not think it necessary for him to find fraud, but the whole thing was very delusive and a catchpenny. He found for the plaintiff for £5 and costs on the higher scale. Defendants were raking in sovereigns in a small back office, and it was not the sort of business that ought to be encouraged in the City of London. The plaintiff had rendered a public service in bringing the action.

REPORT ON VIVISECTION. — A paper was issued on July 22, dealing with the number of experiments on living animals during the year 1910 and the nature of the experiments carried out under Act of Parliament last year. Nine new places were registered for the performance of experiments, and three places were removed from the register during 1910. The total number of licensees was 542. Reports have been furnished by these licensees in the form required by the Home Secretary, these returns showing that 147 licensees performed no experiments. The total number of experiments was 95,731, being 9,454 more than in 1909. Experiments to the number of 90,792 were performed without anæsthetics. These were mostly inoculations, but a few were feeding experiments, or the administration of various substances by the mouth or by inhalation, or the abstraction of blood by puncture or simple venesection. In no instance, says Dr. Thane, the inspector, has a certificate dispensing with the use of anæsthetics been allowed for an experi-

ment involving a serious operation. Inoculations into deep parts, entailing a preliminary incision in order to expose the part into which the inoculation is to be made, are required to be performed under anæsthetics. Certificate A allows experiments to be performed without anæsthetics. The report, however, states that the operative procedure in experiments under that certificate is only such as is attended "by no considerable, if appreciable, pain." In the event of pain ensuing as the result of an inoculation a condition attached to the license requires that the animal shall be killed under anæsthetics as soon as the main result of the experiment has been attained. During last year 49,662 experiments were performed by twenty-seven licensees working at eight institutions in the course of cancer investigations. Of these experiments 48,846 were almost entirely inoculations into mice. A large number of experiments, almost wholly simple inoculations, were performed either on behalf of official bodies with a view to the preservation of the public health or directly for the diagnosis and treatment of disease. Several county councils and municipal corporations have their own laboratories in which bacteriological investigations are carried on, including the necessary tests on living animals, while many others have arrangements by which similar observations are made on their behalf in the laboratories of universities, colleges, and other institutions. A sewage farm is registered as a place in which experiments on living animals may be performed in order that the character of the effluent may be tested by its effects on the health of fish. The Local Government Board and the Board of Agriculture and Fisheries have laboratories which are registered for the performance of experiments having for their object the detention, prevention, and study of diseases of man and animals. In other places experiments were performed on behalf of the Home Office, the Naval Medical Service, the War Office, the Army Medical Department, the Army Medical Advisory Board, the Army Veterinary Service, the General Post Office, the Local Government Board, the Metropolitan Asylums Board, the Royal Commission on Tuberculosis, the Advisory Committee for Plague in India, and the Tropical Diseases and Glass-Blowers' Cataract Committees of the Royal Society. Eighty licensees return nearly 19,000 experiments which were performed for government departments, county councils, municipal corporations, or other public health authorities, and seventeen licensees performed over 8,000 experiments for the preparation and testing of antitoxic sera and vaccines, and for the testing and standardizing of drugs.

Obiter Dicta.

FREEING THE SLAVES. — Lincoln *v.* Africa, 228 Pa. 546.

A DIVORCE ACTION. — Troublefield *v.* Troublefield, (Fla.) 53 So. Rep. 518.

A STUDY IN COLORS. — The principal question in Linton *v.* State, 88 Ala. 216, was whether John Blue was black.

HARD TO BELIEVE. — "A forged instrument can constitute a crime." *Per* Breaux, C. J., in State *v.* Stringfellow, 126 La. 720.

OH, YOU SIMILE! — "An obstruction, like dirt on a boy's face, is merely matter out of place." *Per* Monroe, J., in McCormack *v.* Robin, 126 La. 594.

AUTOMOBILES OR AIRSHIPS? — "Up-to-date improvements lend themselves to hurried marriages." *Per* Breaux, C. J., in Boutterie *v.* Demarest, 126 La. 278.

MUST HAVE MEANT THE BOOKS. — "If any further authorities were needed a pile of them will be found, etc." *Per* Brannon, J., in Brown *v.* Brown, 67 W. Va. 251.

WHY? — Can any one explain the following lawyer's "ad." which appeared not long ago in a Salt Lake City newspaper?

> D. L. OLESON, attorney at law, at Saltair ball game.

A QUESTION OF FACT. — "Upon the contradictory testimony of the two persons having original and authentic sources of knowledge as to the matter to which they testified, the jury has found that the appellant is rightly charged with the paternity of the child." *Per* Gary, P. J., in Curran *v.* People, 35 Ill. App. 275.

STEREOTYPED ARGUMENTS. — Iowa lawyers are evidently getting set in their ways. In Cinkovitch *v.* Thistle Coal Co., 143 Iowa 595, Weaver, J., says, with reference to the argument of one of the counsel in the case under consideration: "A coal mining case without reference to the 'bowels of the earth' and 'black diamonds' would be a much duller affair than 'Hamlet with Hamlet left out.'"

PROFANITY IN KENTUCKY. — What constitutes "profane language" in Kentucky? Some idea of what is not profanity there may be gathered from the following statement of Lewis, J., in Gains *v.* Gains, (Ky.) 19 S. W. Rep. 929: "Some of the witnesses testified he a few times, when provoked, cursed her, though he certainly was not in the habit of using profane language, if he ever did, about which there is doubt; his common expressions being 'Dang it,' 'Darn it,' sometimes 'God damn it.'"

THE HUSBAND SHOULD HAVE HAD THE DECREE. — In Wessels *v.* Wessels, 28 Ill. App. 253, an action for a divorce which was decided in favor of the wife, the court pointed out that the husband was the aggressor in the following episode: "She had been ironing him a white shirt, and had not succeeded in ironing it as nicely as he desired, and he upbraided her in an angry and insulting manner, and said he did not know he had married a wife that did not know how to iron a white shirt, and thereupon he threw the shirt in a rag-bag."

INTELLIGENT LEGISLATION. — As a companion piece to the bill said to have been introduced in the New York legislature providing that when trains approach a crossing together both must stop and neither must start again until the other has passed, our attention has been called to section 9 of an act of the legislature of Florida, approved June 1, 1907, and found on page

232 of the laws of the regular session of 1907, reading as follows:

"SEC. 9. This act shall take effect immediately upon becoming a law."

A COMPREHENSIVE LETTERHEAD. — The subjoined letterhead, which was published in the July number of the *Elks-Antler* (N. Y.), seems to cover pretty nearly everything in the lawyer's line from "legalizing" a deed to trying a lawsuit right at home. We print it just as it appeared, minus the portrait of the advertiser:

Lawyer Joseph B. Braman

Civil War Veteran

of Equitable Building, 120 B'way, N. Y., would greatly appreciate your business.

These are useful offices to know,—Law, Commissioner-for-Every-State, Notary, Deposition, Passport, Naturalization, Consular-Legalization.

Draw & ack. Deeds, etc., legalize them, & do business for All States, Canada, &c. Have titles searched & insured.

Collections made anywhere.

Portrait.

Over 100 Commissions from the PRESIDENT, Governors & Courts, (Law-Consular like) with Laws, Seals, Blank Forms of each State, so no one need go out of his State to give testimony, carry on lawsuit, make or acknowledge Deed, Will, Power of Att'y or legal paper for another State.

EVENING OFFICES at res., 540 W. 145th St., (just off B'way, take B'way Sub-Exp. to 145th St.)

Bring wife there evenings to sign Deeds (not necessary to go downtown) or will call at your home. Day & Night Service & Tel. Calls answered 365 days yearly.

WELL UP ON PLEADING. — An aspirant for admission to the bar of the State of Washington last month submitted the following answer to the question, "What is a negative pregnant?" Answer: "A negative pregnant is where action is brought regarding, or where the *pregnous of* a female is in issue to show she was not pregnant at the time. It is allowable in this State for the purpose of showing measure of damages." Such ingenuity as this should invariably be rewarded, and it was in the case at hand, for the applicant was admitted to the bar.

ADMITTED TO OUR FOREIGN COLLECTION. — Apropos of the paragraph in the Obiter Dicta column of LAW NOTES for June last, entitled "A Letterhead and a Comma," a correspondent in Paris sends us this lawyer's card which has appeared in various legal publications in France, England, and America:

> * S. G. Archibald, B. A., B. C. L., Successor to Edmond Kelly, Counsellor at Law of the New York Bar & Licencié en droit de la Faculté de Paris (corresponds in English, French, German, Spanish and Italian), 82, Boulevard Haussmann. Tel. address, "Archibald, Paris. Telph. No. 264.55.

Our correspondent assures us that as a matter of fact Archibald is not a citizen of the United States, has never lived in New York, is not a member of the New York bar, and is not licencié en droit de la Faculté de Paris. He is said to be a Canadian, a native of Montreal; he has been in Paris but a short time, and claims to be the "successor" — whatever that means — to the late Edmond Kelly, whose position in Paris was a decidedly good one, and who was all of the things which Archibald by adroit advertising claims for himself.

GEEBER FROLICKS. — The following agreement was brought to our office, says the *Litchfield* (Conn.) *Enquirer*, by Mrs. Harriet Potter, of Bantam, she having found it in the attic of the Thomas Coe house:

"I Orlando Landon this 11th day of July 1834 agree to Labor for Kilborn & Coe three weeks, commencing Monday the 14 Inst. for Fifteen Dollars one third to be paid in cash at the expiration of the three weeks Labor, one third to apply as part pay for what I now owe Kilborn & Coe and the other third to be paid in Goods at their Store, for a part of which I agree to take a Scythe Snath and Scythe Stone at One Dollar and seventy-five cents when the three weeks Labor is performed, and am to have the use of it for sd time in their employ and the sd K & Coe are to furnish three Gills of Rum per Day worth four Shillings per Gallon or money to buy the same and I Orlando Landon further agree that if I have any Geeber

Frolicks or am in any way unable to work in consequence of strong drink I will forfeit the wages which may be Due me at the time, as witness our hands

Bradleysville — Kilborn & Coe
11th July 1834 — Orlando Landon."

It appears from the above that what is now termed a "jag," "skate," or "bun," was designated in the days of 1834 by the more dignified phrase of "Geeber Frolick." On the back of the agreement appears the following indorsement: "First week O. L. lost 2 days and labored 4 days. Second week O. L. lost 1½ days and labored 4½ days." As there is no evidence of O. L. having worked at all the third week we presume he had a most beautiful "Geeber Frolick" that week.

NO FARMERS. — A firm of attorneys representing the Great Northern Railway recently wrote to two sisters in Minnesota notifying them that they must refrain from pasturing their cattle upon the right of way of the railway company, in default of which they would be prosecuted under the statute making such an act a misdemeanor. How deeply the estimable ladies resented the implication that they were farmers is evidenced by their reply to the firm's letter. We print their answer in full:

CITY HOTEL
Klatt Sister, Proprietors

Lester Prairie, Minn. July 13th, 1911.

Brown, Albert and Guesmer,
Minneapolis, Minn.

Dear Sirs

Your letter Received by us to day about a Complaint send in to you about pasturing Our Cattle upon the right of way of the Great Northern Railway Company.

Please give us the name of the Person send in the Complaint to yous.

We one no Cattle we Run a Publick Hotel at Lester Prairie for 10 Years and we dount Run no Farm and houw dare you send us such insolding letter. Yous must tack this insoild back if not we will bring Action Aginst yous if yous will not send us the name of the party hue send the Complaint in to yous so we can punished him therefor. we ar not guilty of such a letter has yous send us.

please ancer this letter by return mail.

Yours very truly

Klatt Sisters
City Hotel
Lester Prairie
Minn

Correspondence.

WORKMEN'S COMPENSATION — AMENDMENT TO FEDERAL CONSTITUTION.

To the Editor of LAW NOTES.

SIR: "Viewing with alarm" the good law but poor public policy set forth in the opinion by Judge Werner in the New York case involving the constitutionality of the workmen's compensation act, and being sensible of the grave difficulties likely to arise in the not distant future by reason of the rigidity of our constitutional machinery, I am led to suggest the following amendment to the Federal Constitution. Its adoption would provide a referendum without guile, even to the pronounced conservative, yet introduce a highly desired element of flexibility.

"If a law of any State or of the United States, or a provision of the Constitution of any State, shall be declared to be inoperative by reason of conflict with the (pre-existing?) provisions of the Constitution of such State or of the United States or of any treaty of the United States, as the case may be, by the court of last resort in each respective case, in that case the law or constitutional provision so declared to be inoperative shall be submitted to the electors of the State or of the United States, as the case may be, in which the said law or constitutional provision would otherwise have been operative, at the next ensuing general election of such State or of the United States, but not sooner than one year after the rendering of the decision of such court of last resort. At such general election the electors shall be entitled to vote for or against such law or constitutional provision; if a majority of the votes cast thereon shall be against such law or constitutional provision, then the status thereof shall be that theretofore determined by such court of last resort, until otherwise lawfully determined; if a majority of the votes cast thereon shall be for such law or constitutional provision, then the same shall be operative notwithstanding the decision of such court of last resort, until otherwise lawfully determined."

"The provisions of this article shall be self-executing, but Congress and the several States shall have power to enact laws in aid thereof and not inconsistent therewith."

Sincerely,

THORWALD SIEGFRIED.

SEATTLE, WASH.

ASEXUALIZATION.

To the Editor of LAW NOTES.

SIR: I take the liberty of referring you and your correspondent, regarding the California asexualization act, to two cases found in the early annals of the United States Supreme Court, to wit: *Barron* v. *Baltimore*, 7 Pet. 243, and *Pervear* v. *Mass.*, 5 Wall. 475.

In the former of these cases the Supreme Court, speaking through Mr. Chief Justice Marshall, said in part as follows:

"The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations of power, if expressed in general terms, are naturally, and we think necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments framed by different persons and for different purposes."

In the second case the Supreme Court passed directly upon such a question as seems to be worrying the gentleman from California.

To my mind these two decisions are masterful upon the proposition that the provisions of the United States Constitution and amendments thereto when couched in general terms apply only to the federal government and federal legislation.

W. O. HARRIS, JR.

LOUISVILLE, KY.

"THE *Charm* proceeds to tow this vessel to the port of Ramsgate, and she is charged by certain pilots, in their affidavit made on behalf of the owners, with having run away with her to Ramsgate, for that is the expression they use. That is a most extraordinary expression to employ, considering that the vessel went six miles in four hours. It is an elopement at the very lowest rate of speed of which I have ever heard." *Per* Dr. Lushington in *The Fenix*, Swabey Adm. 13, 15.

Law Notes

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Interstate Rendition of Witnesses.

A NEW YORK statute enacted in 1902 provides that if a criminal case is pending in an adjoining State wherein the defendant is charged with a crime of the grade of felony, a material and necessary witness "residing or being within this State" may be required to appear before "a judge of a court of record in this State," who may grant a subpœna commanding him to appear in the court of the adjoining State where the case is pending, upon tender of ten cents a mile for travel cost and five dollars a day for attendance; "provided, however, that the law of the State in which the trial is to be held gives to persons coming in the State under such subpœna protection from the service of papers and arrest." Disobedience of a subpœna issued pursuant to the statute is made punishable the same as "disobedience of any other subpœna issued from a clerk of a court of record in this State." Motion for a subpœna under the statute was denied by the Special Term in *Matter of Commonwealth of Pennsylvania,* (1904) 90 N. Y. Supp. 308, 45 Misc. Rep. 46, Mr. Justice Blanchard holding, in a short opinion, that the statute was unconstitutional because "it proposes to compel a citizen of this State to go into a locality over which the legislature and courts of this State have no jurisdiction whatsoever," and "was not passed for any public purpose affecting any interest of the people of this State or of any of the citizens thereof," and "would deprive the proposed witness of his liberty without due process of law." But as against all of those objections and some others the validity of the statute was upheld by the Appellate Division of the Supreme Court in *Commonwealth of Massachusetts* v. *Klaus,* 130 N. Y. Supp. 713, decided July 7. Mr. Justice Laughlin dissented from the opinion of Mr. Justice Scott, the latter speaking for himself and Justices Ingraham, McLaughlin, and Clarke. In the dissenting opinion it was especially urged that the statute infringed the federal constitutional provision prohibiting any State from entering "into any treaty, alliance, or confederation" and from entering "into any agreement or compact with another State," etc., without the consent of Congress. Again, it was said that "even if the State of Massachusetts [demanding the presence of the witness] had enacted a law by which the witness would be free from arrest and from service of civil process, there is no guaranty that the law would continue, and I know of no remedy by which the witness could enforce compliance therewith." That is to say, if we may take the liberty to interpret Mr. Justice Scott's thought, a witness artfully compelled by force of such a subpœna to travel into a neighboring State, where Judge Lynch frequently overrules the statute laws which guarantee protection to persons within the State, might be exposed to grave peril. Would ex-Governor Taylor, of Kentucky, have cheerfully submitted to a subpœna from an Indiana court commanding him to appear among Goebel's friends and gun-toter partisans in Kentucky?

Increasing Difficulty to Get Admitted to the Bar.

OF 800 candidates for admission to the bar who took the recent examination in Grand Central Palace, New York city, only 138 received sufficiently high markings to entitle them to classification in the eligible group. We say "eligible group" because each of the 138 must, as a condition precedent to receiving his license as a lawyer, satisfy the committee on character that his or her moral character is such as justifies the court in granting a license. Until recently the requirement of proof of moral character was not very strict, and applicants were admitted merely upon the written statement of two lawyers that their character was good. Now the investigation into the moral character will be conducted in the most thorough manner. It is said that detectives will be employed to investigate the record of applicants when any doubt arises in the mind of the committee on character as to the truth of their affidavits; but that no applicant with good moral character need have any fear that he will not be admitted, for the committee is most careful in according to each applicant for admission a fair and impartial hearing. When it is taken into consideration that four examinations for admission to the bar are held in New York city each year and that there are now about 2,000 students taking the examinations in that city yearly, it will be seen that the work of the examiners and of the committee on character is no easy task.

The power of the court to reject an application on the ground of moral delinquency is clear and unquestionable (*In re Attorney's License,* 21 N. J. L. Rep. 345; *In re Application, etc.,* 67 W. Va. 213, 67 S. E. Rep. 597), except as the court may have been restrained by constitutional legislative enactments. A statute in force in North Carolina in 1906 (Revisal of 1905, §§ 208, 207) provided that an applicant for admission "must file with the clerk of the court a certificate of good moral character signed by two attorneys who practice in that court," and that "all applicants who shall satisfy the court of their competent knowledge of the law shall receive license to practice in all the courts of this State." It was held that the court had no power to go behind the certificate and

investigate an applicant's moral character. *In re Applications for License,* 143 N. C. 1, 55 S. E. Rep. 635, 10 Ann. Cas. 187. "Prior to the enactment of this Revisal the law was otherwise," said the court in the case cited. But in North Carolina Pub. Laws 1907 the Revisal provision was amended so as to require all applicants to satisfy the court of their "upright character."

It is reported that the examiners in New York city will be more careful than hitherto in the examination of candidates as to their knowledge of the English language. The fact can be established any day, it is said, by a visit to the County Court House, that there are many lawyers practicing in the Supreme Court whose use of the English language excels the best imitation of Joe Weber, and that legal papers are filed every day that are puzzles for the justices to work out. Editors of voluminous legal publications in this country are aware that a law writer who is an A. B. of a great university and possesses a competent knowledge of law, is not always able to express his thoughts in readable English.

Some Statutory Regulations for Admission to the Bar.

THE time has been, and it was not a great many years ago, when no statute or rule of court anywhere in this country specified the topics upon which a candidate for admission to the bar must be examined and consequently must have studied. Such enumerations are now quite common in rules of court. For example, rules of the Supreme Court of Vermont which went into effect in November, 1909 (printed in 77 Atl. Rep. vi), provide that: "Such applicants shall be qualified in the law upon the following subjects: common-law pleading and practice; evidence; domestic relations; personal property; contracts, including sales, bailments, and negotiable instruments; agency; partnership; corporations; real property, including mortgages and landlord and tenant; wills and probate law; equity jurisprudence; pleading and practice in chancery; torts; criminal law; the important provisions of Vermont statute law, especially those modifying the common law, and those relating to practice, conveyancing, and probate; the Constitution of this State and of the United States; and legal ethics. They shall be thoroughly and impartially examined upon at least twelve of the foregoing topics. The examination shall be conducted in public, and shall be both oral and written." Similar provisions are in the rules promulgated two or three years ago by the Connecticut judges. And the latter, as well as the rules adopted by the Supreme Court of Texas in 1903 (printed in 96 Tex. 637), name divers text-books that are recommended for study on various branches.

In several of the later revisions of State statutes provisions appear like the following, which is section 2973 of the Alabama Code of 1907: "The members of the board shall, at such meetings, propound in writing, to such applicants, a sufficient number of questions to thoroughly test their learning upon the following subjects: 1. Of the law of real property. 2. Of the law of personal property. 3. Of the law of pleading and evidence. 4. Of the commercial law. 5. Of the criminal law. 6. Of chancery and chancery pleadings. 7. Of the statute law of the State. 8. Of professional ethics. 9. Of the Constitution of the United States and of the State of Alabama. 10. Of the political history of the United States and of the formation of constitutional governments therein. Which questions the applicants shall, in the presence of the board, answer in writing without aid from any person, or from examination of books. Every examination held by the board shall be so substantially different from any other examination previously held as that applicants cannot by the study of any previous examination qualify themselves to pass."

A peculiar condition exists in Indiana. The Constitution of that State provides that "every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice." At the general election in November, 1900, a proposed amendment that "the General Assembly shall by law prescribe what qualifications shall be necessary for admission to practice law in all courts of justice" was submitted to the electors. Nearly 100,000 more votes were cast for the amendment than against it. But it did not receive a majority of the votes cast for presidential electors and governor. The Supreme Court held that it had not been carried by the constitutional majority required for the ratification of a proposed amendment, and, therefore, that an applicant for admission to the bar could not be required to submit to an examination as to his educational qualifications, general or special, although a statute provided (and still provides) therefor. *In re Denny,* (1901) 156 Ind. 104, 59 N. E. Rep. 359, by a divided court.

In Re Toadstools and Mushrooms.

EARLY in September a dozen or more persons in different parts of the country died from eating toadstools, and a correspondent of a New York newspaper suggested that it notify its readers that a book entitled "The Mushroom Handbook; or, How to Know Wild Mushrooms," could be obtained at any of the branches of the Public Library. How many people would be saved by such notification? No one knows better than authors and publishers of law books what a vast quantity of notices of easily accessible sources of information for lawyers and judges is disregarded by the very persons to whom the information should be of special interest and value. No reader of the current reports who is well acquainted with the literature of his profession can fail to observe abundant evidences that both the counsel and the judges frequently and laboriously investigate, argue, and decide questions of law in utter ignorance of the fact that the identical question in dispute has been exhaustively discussed by an expert whose work has been published and duly advertised — quite likely by a specialist whose services command a higher rate of compensation in the open market than the professional income of the counsel or the salary of the judge who perhaps thinks it beneath his dignity to interest himself in offers of aid. It is painful to read opinions of federal and State judges clearly revealing great toil and at the same time making it equally evident that they did not know where, almost at their elbow, was a vast deal of information gathered with still greater toil and skilfully collated that would have enabled them to write a better opinion with only a fraction of their labor. About twenty-three thousand cases are now annually reported and digested in this country. Somebody somewhere is not only keeping pretty good track of all of them that relate to this or that particular topic, but distinguishing the toadstool cases from the mushroom cases and publishing the results in books readily obtainable in the large libraries. By

sensibly appreciating that fact, after due notice thereof, busy practicing lawyers and judges on the bench will promote their mental and physical health and satisfaction.

Wm. R. Laidlaw Dies in Poverty.

THIS is the caption of a paragraph in the New York *Evening Sun* of August 8. Undoubtedly a great number of our readers recollect the case of *Laidlaw* v. *Sage*, 158 N. Y. 73, 52 N. E. Rep. 679. It was twenty years ago that the life of Russell Sage was attempted by an insane speculator who had lost his money in the stock market. Sage was in his Broadway office when Norcross entered the room and, shoving a paper across, demanded $2,000,000 on the spot. The money-lender was quick to sense his caller and told him that he would have to be a little patient for a few minutes. But the words had hardly been uttered before Norcross hurled a bomb at the financier. It has been charged that Sage thrust his bookkeeper, Laidlaw, in front of him as a shield—but the charge was denied, it is fair to say. At any rate, Laidlaw made good as a protection to the money lender, because after the explosion the surgeons counted no less than one hundred and eighty wounds on Laidlaw, and Sage was unhurt. The bomb blew Norcross to pieces.

For months Laidlaw suffered on a cot in a hospital. On his discharge, broken in health, his constitution shattered by the shock and the fierce injuries, he applied to Sage for compensation. There was no pay coming from the money lender. Laidlaw had to seek adjustment of what he considered his lawful rights in the courts. He sued Russell Sage. It was brought out that at the time of the tragedy, Dec. 4, 1891, the bookkeeper was thirty-five years old with the fine physique of an athlete. He came into court a cripple as a result of the attempted assassination. He got a verdict for $40,000, but Sage appealed and obtained a decision setting aside the verdict. Laidlaw never recovered a cent. Broken in health, he was cared for by two sisters. Two weeks before his death he was admitted to the Home for Incurables. He left a widow and a son.

Injuries to Children Illegally Employed in Factories.

A CASE of special interest to legal advisers of employers of child labor is *Berdos* v. *Tremont & Suffolk Mills*, 95 N. E. Rep. 876, decided July 24 by the Massachusetts Supreme Judicial Court. The plaintiff, a lad less than fourteen years old, born abroad and unable to speak English, while waiting for his work, which was about spinning mules in the defendant's cotton factory, stood with his back toward some gears covered by a guard or shield, on which one of his hands rested. In some way not exactly explained, this hand got beyond or under the guard, and was cut by the gear. No instructions or warning were given him as to such a danger; and he testified that he had never looked to see, and did not know that there were gears under the guards. He had been employed about four weeks and had never before worked in a factory. The State statute prohibited the employment in any factory of a "child under the age of fourteen years," and imposed a heavy penalty for violation thereof. Upon consideration of the purpose and language of the statute the court held (1) that "a minor who can trace his injury to a breach of the duty imposed by this statute as its direct and proximate cause may have a right of action therefor;" (2) that a plaintiff employed in violation of its terms must prove his own due care (the rule in Massachusetts), "though conduct which might be pronounced reasonably cautious in him might fall far short of it in an adult;" (3) that the plaintiff while at work was not acting in violation of the law; (4) that "considering the age of this plaintiff, his inexperience and ignorance of our language and customs, and his proximity to partially hidden moving machinery, it could not have been ruled properly as matter of law that he was not in the exercise of such care as ought reasonably to have been expected of him;" (5) that the statute has "the further effect of preventing the defendant from shielding himself behind the defense of contractual assumption of risk;" and (6) that "the plaintiff is not entitled to recover unless the violation by the defendant of its statutory duty to him directly contributed to the injury; the breach of law upon which a plaintiff may found his right of recovery must be not merely a condition or an attendant circumstance, but a contributory cause." On this last point, however, the court said the evidence apparently proved that the sole cause of the injury was the temperamental uneasiness and heedlessness of the consequences of restless movements characteristic of childhood when placed in the midst of rapidly moving machinery, and therefore that the violation of the statute might have been found to be a contributing or perhaps the sole cause of the injury suffered.

To the point that contributory negligence will bar recovery in such cases the court cites and follows numerous decisions in many jurisdictions, but also cites in a footnote a considerable number of cases which hold that a statute of this sort abrogates the defense of contributory negligence.

It may be that the boy was heavy witted as well as ignorant. But who shall measure the stupidity of factory owners or superintendents upon whom the vast number of accidents arising from neglect to instruct young employees as to the dangers of their employment have made no impression? No wonder the juries award heavy damages.

Massachusetts Supreme Judicial Court.

THE suggestion of Professor Samuel Williston of the Harvard Law School for a place on the Supreme Judicial Court of Massachusetts which will be made vacant by the promotion of one of the associates to the place of Chief Justice Knowlton, whose resignation went into effect September 6, is the occasion of an interesting editorial in the *Boston Transcript*. No Harvard law professor has ever been elevated to the Supreme Bench of the State. While twenty-two of the members of the Massachusetts Supreme Judicial Court in the past have been graduates of the law school, only two — Oliver Wendell Holmes and John Lathrop — were officially connected with the law school, and they were both merely instructors. The most eminent of Massachusetts jurists, Joseph Story, was a professor of law at Harvard 1829–1845, and was associate justice of the United States Supreme Court 1811–1845, but he never was a justice of the Massachusetts court. Of the members of the Supreme Court at the present time, Mr. Justice Morton and Mr. Justice Loring are the only ones who were graduated from

the Harvard Law School. Mr. Justice Hammond has no LL. B. degree, taking his academic course at Tufts College; Mr. Justice Braley was never a bachelor of law, and had his preliminary training at Pierce Academy, Middleboro; Mr. Justice Sheldon had no LL. B. degree, but took his A. B. at Harvard in 1863; Mr. Justice Rugg is an A. B. of Amherst, but took his law degree at Boston University; retiring Chief Justice Knowlton also had no LL. B., but was a Yale A. B. 1860.

Perhaps this failure to translate the professor to the bench is due to the peculiarly enviable position which a Harvard law professor occupies. It is difficult to find in the United States any scholastic position which is on a par with it. The chairs are heavily endowed, and the salary of the average professor is much higher than the salary of the professors in Harvard College, being, we believe, five thousand dollars for a full professor in his first year and increasing with service. Besides these fairly good salaries, the professors, particularly the older and more experienced ones, are frequently consulted in an advisory capacity by practitioners, and are employed to give opinions and argue questions at law, from which they derive an additional income. They very seldom appear in court, but appearing in court nowadays is not the most lucrative business for a lawyer. Because of the attractiveness of the berth, few law professors can be seduced from Harvard even to take the deanship of any other law school or to take a place on the Supreme Bench of Massachusetts, the salary of which has only this year been increased from $8,000 to $10,000. It may be said, with reference to the position of professors of the law school, that it is they themselves who, by the high rank of their work, have made their places so attractive and worth keeping. While the salaries paid are higher than those of any other law school in the United States, they do not represent the value of the school to the university. It is one of the few departments that pay their way. Independent of endowments or anything else, it turns into the treasury of the university every year a substantial sum.

Litchfield Law School Building Dedicated to Posterity.

On the evening of August 17, the restored law office of Judge Tapping Reeve, the home of the first law school in the United States, was formally presented to the Litchfield Historical Society at Litchfield, Conn., and appropriate addresses of unusual interest were delivered upon that occasion. The building was given to the society by Lieut. Dwight C. Kilbourn, the veteran clerk of the Litchfield County Superior Court. He had been financially aided in purchasing and restoring it to its original condition by Mrs. Emily N. Vanderpoel, whose grandfather received his training as a lawyer at the school, a large number of her immediate family also being members of the bar. Mr. Kilbourn's delightful volume on "The Bench and Bar of Litchfield County," published last year, was the subject of an appreciation in Law Notes for June, 1910. We printed an article on the old Litchfield Law School in our February, 1901, number, with a picture of the law school building, and Mr. Kilbourn did us the honor of reprinting it in his book. A catalogue of the school, containing the names of more than a thousand students who received instruction there from 1798 to 1833, was published a few years ago by the Litchfield *Enquirer*. Opposite the name of each is given the State from which he came — two or three hundred were Southerners — and mention of the positions he subsequently filled.

At the presentation above mentioned the principal address was delivered on behalf of the society by Hon. Morris W. Seymour, son of the late Chief Justice Origen S. Seymour. Summarizing the achievements of individual graduates of the school, he said: "Sixteen of the graduates of the school were subsequently members of the United States Senate; ten became governors of their respective States; two justices of the Supreme Court of the United States; forty judges of the highest courts of their respective States; fifty were members of Congress; five were members of the cabinet of the several administrations; and several were sent to represent the United States as foreign ministers attached to our diplomatic service abroad. In the year 1831 the vice-president of the United States and one-eighth of the Senate of the United States had been educated in Litchfield county, nearly all of them at the Litchfield Law School." The vice-president to whom he referred was John C. Calhoun, and we observe his name in the catalogue under the year 1805.

Other addresses were delivered by Col. A. E. Lamb and Hon. W. B. Hornblower of the New York bar; Hon. Edwin B. Gager of Derby, Conn., judge of the Superior Court; Charles Gould, Esq., of New York city, a grandson of Judge James Gould of the Law School, who was the author of the well-known treatise on Pleading; and Hon. George M. Woodruff of Litchfield.

Memory *versus* the Logical Faculty.

In the course of his address at Litchfield Col. Lamb said: "I do not believe that the curriculums of the great law schools of to-day are superior to that devised and formulated by Judge Reeve. The first rely on memory, the other on the logical faculty. Under the present system, if the memory fails, the practitioner is graveled for lack of matter." We agree with Col. Lamb to the extent of acknowledging that in reading the reported opinions of judges by far the highest satisfaction is derived from those which convince us without the discussion of precedents — those which we feel would command the assent of intelligent laymen. And we still find them here and there in the current reports, especially and significantly of the courts that are commonly recognized by lawyers as of foremost authority.

Nevertheless, memory is a convenient faculty, sometimes indispensable, and cannot be ignored by the law schools. For example: It was held in Massachusetts that one who drives in a sleigh without bells is not a trespasser on the highway, although a statute makes him punishable criminally for the failure to have the bells attached to the harness, and he is not liable for injuries suffered by one who comes into collision with him unless the injury was caused by the neglect to have the bells. *Counter* v. *Couch* (1864), 8 Allen 436. Since then it has been repeatedly held, however, that the operator of an unregistered automobile upon the highway in violation of the penal statute of that State "is guilty of conduct which is permeated in every part by his disobedience of the law," and which necessarily and directly contributes to the injury of a person with whom he comes into collision;

and the doctrine of the sleigh-bell case does not apply. *Chase* v. *New York Cent. R. Co.* (March, 1911), 208 Mass. 137, 94 N. E. Rep. 377. More recently it was decided that if the automobile was registered in compliance with the statute, but the chauffeur was unlicensed and therefore punishable for operating the machine, the sleigh-bell case applies, and it is reversible error to instruct the jury that he was a trespasser upon the highway. *Bourne* v. *Whitman* (May, 1911), 209 Mass. 155, 95 N. E. Rep. 404. In the argument and decision of each of those cases, especially in the last one, the logical faculty was conspicuously exercised. But the point we make is that the faculty is now *functus officio,* and a lawyer's naked memory of those cases will serve him better in an identical case than the combined logical faculties alone of the authors of Blackstone's Commentaries, Kent's Commentaries, and Cooley on Torts — that is, under the system of law administered by English-speaking peoples,

"From precedent to precedent."

The New York Business Bar.

"I DO not think that we have to-day in the city of New York a Pinckney, Calhoun, Hamilton, Kent, Webster, Evarts, O'Conor, Choate, Beach, Black, or Gibson," said Colonel Lamb in his Litchfield address. Similar sentiments were expressed by Mr. Justice Patterson of the New York Supreme Court in an address before the Phi Delta Club in New York in 1898. But if our memory serves us, it was not long ago that Joseph H. Choate uttered a strong dissent from such views. Colonel Lamb might truthfully have said that New York has not to-day a Whitefield, whose open-air meetings are said to have terminated with a multitude of human bodies in nervous convulsions covering the ground. But are there no first-rate preachers of Christianity in the city to-day? Presenting a rather promiscuous list of names of lawyers with an allegation that they cannot be matched to-day does not greatly impress us. Lecky says of Sir Thomas Erskine's appeal to the jury in defense of Stockdale that it was "the most eloquent speech ever delivered in a British court of justice." Among all the men named by Colonel Lamb, who was a greater jury lawyer than Erskine? But if Erskine were living in New York to-day, would any sensible lawyer rank him with Charles Evans Hughes as a fit candidate for a place on the bench of the United States Supreme Court? Imagine Erskine delivering the argument of the comparatively obscure Hargrave in the great case of Sommersett before Lord Mansfield!

Continuing, Colonel Lamb said: "Law has largely ceased to be a profession. It has become a business. The great lawyer of to-day is a business organizer and evader of the law, not a creater and expounder thereof. He is no longer willing to work hard, live well, and die poor. His business instincts will not permit him. The great lawyer of to-day is a corporation lawyer. His fees are gauged by the necessities and wealth of the corporation. His real clients, the great army of stockholders, he never sees. His failures are charged to the infirmities of the courts. There are no post-mortems." Pick up almost any volume of the Federal Reporter, for instance, and you will find numerous egregious blunders that were committed by — or at least in the name of — "the great lawyer," which could have been avoided had he been "willing to work." "In the catalogue," to adopt Macbeth's phrase, he is clept by the name of lawyer, and up-staters or down-easters in the vicinity of the estate on which he spends much of his time pronounce him "great."

Text Books in 1872 and in 1911.

A FIFTH edition of Dillon on Municipal Corporations, enlarged to five volumes, was published a few weeks ago, likewise a six-volume work on the same subject by Judge McQuillin of St. Louis. Judge Dillon's first edition was published in 1872 in a single volume, and was the first American treatise on that branch of the law. In his preface to that edition he said the making of the book "fills up the interstices between judicial duties for nearly nine years;" that the decisions in this country relating to the subject being scattered through the reports of the federal courts, and those of thirty-seven States, there was little to guide him, either as to the arrangement of his subject or as to what had been decided by the courts concerning it; and "accordingly, he had no recourse except to delve laboriously for his materials among hundreds of volumes," which he had examined one by one. Year by year his official duties more and more encroached upon his time, leaving for work on his book only the diminishing intervals between courts. "In its preparation," he continued, "he has often envied the author by profession the opportunity for continuous and unbroken labor." That edition cited only about 6,000 cases. Its compilation was quite likely regarded by him as a pretty big task. Certainly it was of exceeding value to the profession. But unquestionably Judge McQuillan and Judge Dillon himself would now consider the finding and handling of 6,000 cases as a comparatively small undertaking. In late years some law text books of the highest merit have been the product of a careful reading of as many cases, perhaps, on the author's subject alone as were reported between the covers of all the volumes from which Judge Dillon extracted the cases on municipal corporations for his first edition. This difference in conditions has been developed in the space of forty years. Imagination recoils at the thought of what shall be the magnitude of labor necessary for an author attempting to keep abreast of his times forty years from now. The double consumption of enormous space in printing tables of many tens or a few hundreds of thousands of cases cited and in printing them again in the notes to the text, and the consequent cost to lawyers, are matters sufficiently appalling — except to the printers.

Forty Years of Law Reports.

WE recollect, and of course a great number of our readers can recall, approximately the number of volumes of reports that were extant in several jurisdictions in the United States about the year 1880. Let us go back to 1872, the year when Judge Dillon's first edition appeared, and compare the number we would have found on the shelves at that time with those that confront us now. Passing along the book stacks with pencil and paper we collect the following, the figures first given being those for 1872, and against them the figures on the latest volumes:

Ala. 48–168; Ariz. 1–12; Ark. 28–95; Cal. 45–158; Cal. App. 0–14; Colo. 1–48; Colo. App. 0–20; Conn. 39–83; Dak. 1–6 (No. Dak. 0–18; So. Dak. 0–25); Fla.

14–59; Ga. 47–135; Ga. App. 0–8; Idaho 2–18; Ill. 66–249; Ill. App. 0–158; Ind. 41–173; Ind. App. 0–45; Iowa 36–147; Kan. 10–83; Ky. 72–141; La. 24–127; Me. 62–106; Md. 37–110; Mass. 111–207; Mich. 26–164; Minn. 19–113; Miss. 47–96; Mo. 51–232; Mo. App. 0–153; Mont. 1–42; Neb. 2–88; Nev. 8–31; N. H. 53–75; N. J. Law 36–79; N. J. Eq. 23–77; N. Mex. 1–14; N. Car. 67–154; Ohio 23–83; Okla. 0–27; N. Y. 47–201; N. Y. Supp. 0–128; various New York reports prior to 1872, query; Oreg. 4–55; Pa. 72–230; Pa. Co. Ct. 0–37; Pa. Dist. 0–19; Pa. Super. 0–45; R. I. 10–30; S. Car. 4–86; Tenn. 58–122; Tex. 37–102; Tex. Civ. App. 0–54; Tex. Crim. 0–59; Utah 0–36; Vt. 44–83; Va. 22–111; Wash. 0–60; W. Va. 5–67; Wis. 31–145; Wyo. 1–17; U. S. 84–219; Fed. Rep. 0–186; Ct. Cl. (U. S.) 6–45; other federal reports, say 50–150.

Total, 1517–5947.

AESTHETICS AND THE LAW.

WITH æsthetic theory the law does not concern itself. But notwithstanding its utilitarian point of view, the law takes notice of æsthetic feeling. The universality of this feeling requires that it should be treated as a fact.

That the gratification of this feeling and the cultivation of æsthetic taste are proper objects of government appears to be undisputed. See *Varney* v. *Williams,* 155 Cal. 318; *Curran Bill Posting Co.* v. *Denver,* 47 Colo. 221. For example, the expenditure of public money for the decoration of public buildings and parks is regarded as proper. See *Kingman* v. *Brockton,* 153 Mass. 255. Public parks, said Chief Justice Knowlton of Massachusetts, are "expected to minister not only to the grosser senses, but also to the love of the beautiful in nature in the variety of forms which the changing seasons bring. Their value is enhanced by such touches of art as help to produce pleasing and satisfactory effects on the emotional and spiritual side of our nature. Their influence should be uplifting and in the highest sense educational. If wisely planned and properly cared for, they promote the mental as well as the physical health of the people. For this reason it has always been deemed proper to expend money in the care of them and make them beautiful and enjoyable. Their æsthetic effect never has been thought unworthy of careful consideration by those best qualified to appreciate it. It hardly could be contended that the same reasons which justify the taking of land for a public park do not also justify the expenditure of money to make the park attractive and educational to those whose tastes are being formed and whose love of the beautiful is being cultivated." *Atty.-Gen.* v. *Williams,* 174 Mass. 476. Similarly, a municipality may open a highway leading to "pleasing natural scenery" if the public want to travel thereto. *Higginson* v. *Nahant,* 11 Allen (Mass.) 530. Moreover, the legislature may encourage private owners of houses in residential districts to adorn their premises by allowing them to use part of the highway. *Garrett* v. *Janes,* 65 Md. 260. To these illustrations may be added a decision to the effect that a bequest for the establishment of an art institute is a charitable trust. *Almy* v. *Jones,* 17 R. I. 265.

Occasionally the courts have even said that the prevention of injury to beautiful objects, such as shade and ornamental trees, is of greater consequence than the mere assessment of money damages for their destruction. *Darling* v. *Newport Elec. L. Co.,* 74 N. H. 515. But a different view is entertained with respect to the status of ugly objects or such as are destructive of beauty. For instance, in an early English case involving the question whether the obstruction of one's view is actionable, it was declared that "for prospect, which is a matter only of delight, not of necessity, no action lies for the stopping thereof." *Aldred's Case,* 9 Coke 59. Regarding beauty as a matter "only of delight," the law does not regard ugliness as a nuisance. Thus it has been said that the fact that a fence is "rough and unsightly makes no difference. The law does not require such fences to be constructed of fine materials or that they shall be attractive in appearance." *Giller* v. *West,* 162 Ind. 17. But there appears to be no good reason why offenses to the eye should not be placed in the same category as offenses to the nose or to the ear. A tendency in that direction is indicated by a recent decision of the English Court of Appeal, to the effect that a covenant not to carry on any offensive trade on a lot in a residential district was violated by the maintenance of a large board whereon bills were posted. *Nussey* v. *Provincial Bill Posting Co.,* [1909] 1 Ch. (Eng.) 734, 16 Ann. Cas. 222. It is not improbable that the cultivation of æsthetic feeling will ultimately lead to the extension to ugly objects of the principles of the law of nuisances. The rule that in determining whether a particular thing is a nuisance regard must be had to place and circumstances, and to the effect of the alleged nuisance upon persons of ordinary sensibilities, could readily be applied to objects which are obnoxious to the eye.

But that the law has not as yet reached such a stage is manifested by the decisions relating to the right of the legislature to prohibit the use of billboards or to restrict the height of buildings. So far the courts have held that the prohibition of the use of billboards for purely æsthetic reasons is not justified by the police power. *Varney* v. *Williams,* 155 Cal. 318; *Curran Bill Posting, etc., Co.* v. *Denver,* 47 Colo. 221; *Chicago* v. *Gunning System,* 214 Ill. 628, 2 Ann. Cas. 892; *Passaic* v. *Paterson Bill Posting, etc., Co.,* 72 N. J. L. 285, 5 Ann. Cas. 995; *Bryan* v. *Chester,* 212 Pa. 259. The same is true of the restriction of the height of buildings for the sole purpose of promoting architectural symmetry. *Welch* v. *Swasey,* 193 Mass. 364, affirmed 214 U. S. 91. However, if compensation is allowed to the owners, the use of billboards may be prohibited and the height of buildings may be restricted, at least for the purpose of enhancing the beauty of a public park. *Atty.-Gen.* v. *Williams,* 174 Mass. 476; *Com.* v. *Boston Advertising Co.,* 188 Mass. 348.

The theory underlying these decisions is that the gratification of æsthetic feeling is a luxury, and that private property can be taken under the police power only in cases of necessity. But it may be pointed out that in some cases, the circumstances of which seem to warrant the inference that the legislature had in mind æsthetic considerations alone, the courts have upheld statutes restricting the height of buildings on the ground that they were intended to prevent fires (*Cochran* v. *Preston,* 108 Md. 220, 15 Ann. Cas. 1048); and ordinances prohibiting street advertisements on the ground that they were intended to prevent the obstruction of the streets by collecting crowds. *Com.* v. *McCafferty,* 145 Mass. 384; *Fifth Ave. Coach Co.* v. *New*

York, 194 N. Y. 19, 16 Ann. Cas. 695, affirmed 31 U. S. Sup. Ct. 709. Moreover, even under the existing law, "if the primary and substantial purpose of the legislation is such as justifies the act, considerations of taste and beauty may enter in as auxiliary." *Com.* v. *Swazey,* 193 Mass. 36, affirmed 214 U. S. 91.

However, aside from the recent tendency to broaden the scope of the police power, the decisions denying that the suppression of ugliness is a necessity do not settle the question for all time. The very existence of modern legislation aiming at the abolition of billboards and "sky-scrapers," at least in residential districts, seems to betoken a widespread and an increasing love of the beautiful. As soon as this feeling becomes sufficiently pronounced, so that it may be regarded as being shared by the average person, the courts will no doubt sanction such legislation. When things which were formerly regarded as luxuries have become necessities the courts are bound to treat them as such. See *Atty-Gen.* v. *Williams,* 174 Mass. 476. As in other cases of justifiable regulation, the resulting interference with particular individuals will be presumed to be compensated for by their sharing in the advantages of such regulation. In fact, it has been suggested by an able judge that although the weight of authority is undoubtedly against the exercise of the police power for purely æsthetic purposes, it may be that in the development of a higher civilization the culture and refinement of the people has already reached the point "where the educational value of the fine arts, as expressed and embodied in architectural symmetry and harmony, is so well recognized as to give sanction, under some circumstances, to the exercise of this power even for such purposes." Worthington, J., in *Cochran* v. *Preston,* 108 Md. 220, 15 Ann. Cas. 1048.

PHILIP SACHS.

CAPITAL STOCK OF PRIVATE CORPORATIONS.

WHAT is the capital stock of a corporation, and what, if any, are its purposes? This is a question on which neither courts nor legislatures have had any very clear ideas, and over which courts have become badly involved in inconsistencies. The opinions of the latter have been continually vacillating between one notion and another, with the result that an accurate statement of its purposes has never been clearly set forth. The original conception of capital stock is intelligible enough, but it has come about that to-day the term is considered something of a joke both by lawyers and by laymen.

To-day, as formerly, the only two classes of persons who can be in any way concerned with or interested in the capital stock of a private corporation, if that term has any real meaning, are first, creditors, and second, purchasers of its stock certificates. But the term has no real meaning. It stands for nought, and that is the point for consideration. These two classes of persons obviously are interested in something. Let us see what that is.

First, as to creditors (the small creditors — the current creditors — as distinguished from those whose business it is to loan funds). They are dealing with a debtor of limited liability, one for whose obligation the individuals composing the corporation are not personally liable. Now if a group of individuals are going to trade under a limited liability it is but proper that they advise their customers of such fact. This is of course presumed in this country from the mere fact of incorporation. Corporations to-day, however, are so trading without any proper restrictions, that is to say, they are free to encumber their entire assets (even to commence business with them so encumbered) and go serenely on contracting debts, for the payment of which no one is legally responsible. This they do, as every one knows, in the face of the iterated and reiterated legal doctrine that capital stock must be paid for in full, and preserved intact for the protection of creditors, and in the face of such statutes as we find in New York, New Jersey, and elsewhere aimed at fraudulent preferences made by companies actually insolvent. These acts are a step in the right direction, but they do not go far enough. How much of a fund is preserved intact for creditors when a company purchases property valued at say $1,000,000 from an irresponsible promoter and pays for it by a $1,000,000 bond issue plus a few millions stock? Here of course there is no protection to creditors from the beginning, but even that is no worse than the case where the corporation has property to commence with, but has it not when it is most wanted.

I am not unmindful that some jurisdictions have occasional beneficial provisions for the protection of creditors, as where railroad corporations, and even some business corporations, are restricted in their bond issues. But the fact remains that in general there is no such restriction. The law is weak.

What is wanted is a guaranty — something that talks facts and is not merely making faces at the parties interested. This, indeed, is the present attitude of capital stock. The law should guarantee to these current creditors an unencumbered fund, the property of the stockholders, which is liable for the debts of the corporation; and the integrity of this fund should be preserved during corporate life. This is one of the admitted functions of capital stock in our law, but in practice it falls far short of its intended purpose.

Next, as to purchasers of stock certificates, it is desirable to devise some method by which they may ascertain the value of that which they propose to buy. The present method is undeniably crude and consists in writing on the face of the certificates the ostensible value of the company's plant — its capital stock — and the relative value of a single certificate — $100. This method, to be sure, does not deceive our expert speculators, but it does deceive an astonishingly large number of persons who ought to know better, and enables an undesirable class of company promoters to thrive at their expense. The remedy is obvious.

Now observe that in neither case is any one interested in the meaningless term "capital stock." The interest of one class centres wholly on the unencumbered reserve fund, while that of the other centres on the question of present the future value of the corporate plant. The term "capital stock" has no significance whatever. It would seem clear therefore that it could profitably be eliminated from corporation law, and in its stead be substituted terms descriptive of its two professed purposes, to wit: "reserve fund" and "value of properties."

In the incorporation and organization of a corporation the first step of importance is the acquirement of property. And the value of this corporate property when acquired is of no direct concern to any one other than the

present shareholders unless the shares are to be sold to outsiders; and as this is frequently the case it behooves us to see to it that its value is not misrepresented, and that no artifice is used to deceive buyers. This object is very easily attained.

In the beginning let the promoters of a corporation be required to file with the certificate of incorporation a separate sworn statement of the facts on which they base the value of the plant which it is desired to sell to the corporation, and also a further sworn statement by the board of directors of the corporation similarly showing how they arrived at the value of the plant for which they propose to pay. This has been the method adopted by Massachusetts and is likewise the basis of German company law. So far, however, the information is of value only to prospective purchasers of the stock certificates, and even as to them it is of questionable utility, although it would do good rather than harm.

The certificates of stock should properly contain no reference to the value of the company's properties — *i. e.*, its capital stock — but simply the number of aliquot parts (shares) into which the property is divided. Persons desiring to place a value on these shares could have recourse, among other things, to the sworn statement of facts filed by the promoters and directors. From these facts they would be enabled to compute the somewhat intricate problem of present values. This indeed would be the only function of the sworn statements of the promoters and directors. In the interest of purchasers of stock certificates, however, it is doubtful whether anything further than the eradication of the dollar mark from the share certificates is necessary. This, together with the elimination of the term "capital stock" would undoubtedly check the evil of overcapitalization, for the sole motive of inflation of paper capitalization has its source in the promoters' camp, and this for the simple reason that to altogether too many persons, getting a $100 share certificate for a fraction of that sum is fearfully like getting something for nothing.

The German law, after providing for sworn statements by promoters and directors regarding the value of the properties, endeavors by elaborate provision to insure the creation of a corporation whose valuation and capital stock are, and will remain, equal. But one may rightly ask, why concern ourselves with this phase of the problem when the mere elimination of the dollar mark will settle it once and for all? And after this simple expedient let us centre our attention on the reserve fund for creditors, which is the only other professed function of capital stock.

Trading under limited liability does not, nor was it intended to, imply that the individuals so trading might incur debts over and above their assets — current and capital — and then, when all further credit is exhausted, surrender what is left — usually nothing — and remain not liable for their debts. There is reason in all things.

So, in addition to the sworn statements above set forth, the certificate of incorporation should contain, in lieu of the usual capital stock, a statement of the unencumbered reserve fund, which the company will maintain as an index of its credit. Such a fund could with propriety consist of any amount which the corporation saw fit to name. But whatever the amount, be it greater or less than the value of the company's tangible property, let it be the duty of the officers to maintain this fund in its integrity on penalty of themselves incurring personal liability for the corporate debts. That is to say, just as soon as the liabilities encroach materially on this fund, let it and let it also be the duty of the board, when the liabilities on the policy to be pursued to get the company on its feet; and let it also be the duty of the board, when the liabilities of the company become equal in amount to the reserve fund, to go immediately into bankruptcy on the penalty of being rendered personally liable for its debts. This would be limited liability on a sound footing, and it is the method adopted by the German law to attain this end.

Allowing the corporation to name the amount of its reserve fund would be compatible with its electing to name no fund whatever. In this case creditors would know what its obligation was worth. They would, for instance, know whether they were contracting with X Company, Limited, no assets, or whether it was X Company, Limited, reserve fund $1,000 or $100,000, as the case might be, and the effect on their respective credits would be obvious. It would come about in time that trading companies of a given size would find it necessary to maintain a reserve fund of an amount established by custom and corresponding in some way to its size and extent of business. But no matter how small the fund, it would be vastly superior to the mythical capital stock of our present-day corporations, which is, or is not, according as the corporation is prosperous or insolvent.

It would seem to the writer that a system of corporation law based on these two fundamental ideas would inure to the benefit of all concerned, and bring order out of utter chaos.

Unquestionably a limited liability company should maintain a fund for the protection of creditors, but let the provision of law in regard to it be separate and distinct from that respecting the value of properties — *i. e.*, capitalization — always a question for experts. This fund, as above stated, would be such an amount as the corporation chose to set forth in the certificate of incorporation as an index of its credit. And such a fund could with propriety consist of (1) surety company's bond, (2) securities held in trust, (3) tangible assets of the corporation taken at a conservative valuation. In its crudest form, of course, a reserve fund might consist of securities held in trust for creditors, but there is no need to resort to this expedient when the company's plant serves just as well. The law, however, must guarantee its integrity, and not permit of its incumbrance or deterioration. Trading under limited liability should be carried on according to rule, and not in the slipshod manner of the present time; and a reserve fund, even though small, should be guaranteed by law. While it might be well enough to allow companies to engage in business without naming any reserve fund, it would undoubtedly be better if the law required a minimum fund in all cases. In its last analysis it amounts to going bond for current indebtedness.

At present when the owners of a incorporated business go on a rock, they may keep right on piling up debts until the crash comes. They do this not at their own risk, for they have nothing to risk, but at the sole risk of unsuspecting creditors. If, however, the law attaches a personal liability for debts on the officers after the point is reached where liabilities are greater than the reserve fund, such a rule would place the risk where it belongs, and business dealings with corporations would be on a sound basis.

To create a reserve fund, however, founded on the

present value of a business would never do at all, for the reason that such values are based on earning capacity; and when the earning capacity decreases there is no clearly defined shrinkage in the value of the property (hope of future earnings would always maintain the value in the eyes of the proprietor of the business), so that such a reserve fund would be an illusion. It must be based on tangible assets, else it means nothing.

Assemble together all the tangible property of the plant and ascertain from the sworn statements of the promoters and directors and from other sources the cost of reproducing it; and permit this amount to be called the reserve fund. If it is not enough to maintain the company's credit — a remote possibility — then resort may be had to either a surety company's bond or the purchase of securities. Either of these methods is feasible, and would equally effect its purpose.

I have stated above that a reserve fund is to be considered for the benefit of current creditors and not of those who deal in loanable funds. This is evident because when a bank or other moneyed institution loans money to a corporation it does not undertake to juggle with its capital stock nor with its quotations on the Stock Exchange, but, business-like, calls for a monthly balance sheet, and carefully keeps its finger on the pulse of corporate reputation. Just so soon as danger is scented, the money is recalled. This method, of course, is impracticable for current creditors, although to judge from occasional decisions they are presumed to adopt it.

Decisions of courts on the questions concerning capital stock are most annoying. The courts vacillate between the idea of a kind of reserve fund for creditors, and the notion that whenever the corporation is really hard up (the time when creditors are mostly concerned — in fact, the only time) it may entirely dissipate this fund by poor business management and yet advertise itself as in possession of the original amount. Again we are told that when business is very bad indeed, it may sell its stock for whatever it can get. It may even give it away. *Christensen* v. *Eno,* 106 N. Y. 97; *Handley* v. *Stutz,* 139 U. S. 417. Concerning the nature and purposes of the capital stock of a corporation, the latter case makes the following statement:

"The case then resolves itself into the question whether an active corporation, or, as it is called in some cases, a 'going concern,' finding its original capital impaired by loss or misfortune, may not, for the purpose of recuperating itself and providing new conditions for the successful prosecution of its business, issue new stock, put it upon the market and sell it for the best price that can be obtained. . . .

"To say that a corporation may not, under the circumstances above indicated, put its stock upon the market and sell it to the highest bidder is practically to declare that a corporation can never increase its capital by a sale of shares, if the original stock has fallen below par. The wholesome doctrine, so many times enforced by this court, that the capital stock of an insolvent corporation is a trust fund for the payment of its debts, rests upon the idea that the creditors have a right to rely upon the fact that the subscribers to such stock have put into the treasury of the corporation, in some form, the amount represented by it; but it does not follow that every creditor has a right to trace each share of stock issued by such corporation, and inquire whether its holder, or the person of whom he purchased, has paid its par value for it. . . .

"The liability of a subscriber for the par value of increased stock taken by him may depend somewhat upon the circumstances under which, and the purpose for which, such increase was made. If it be merely for the purpose of adding to the original capital stock of the corporation, and enabling it to do a larger and more profitable business, such subscriber would stand practically upon the same basis as a subscriber to the original capital. But we think that an active corporation may, for the purpose of paying its debts, and obtaining money for the successful prosecution of its business, issue its stock and dispose of it for the best price that can be obtained."

Now there is an entire lack of principle in that utterance. It doesn't mean much of anything, and certainly isn't doing very much for creditors. Nevertheless, to see it at its worst, take the case when the parties are reversed. The creditors are compelling recalcitrant stockholders to pay in full for their partly-paid shares, stockholders, moreover, who have taken their shares on an understanding with the corporation that they are full paid. This is positively unfair to the shareholder. The case of *Lee* v. *Heppenheimer,* 69 N. J. Eq. 36, is a good illustration of how our crude policy works out in practice. Here the stockholders, living in different States, had received large quantities of stock as a bonus. The corporation having gone to the wall, its receiver brought suit against stockholders residing in New Jersey. There were only a few such within the State, and of these few all but one or two were insolvent. These latter were accordingly proceeded against, and compelled to settle the claims of creditors in full. If there is any justice or equity in such a proceeding it doesn't appear on the surface. After reading these and hosts of other cases on this topic, one is apt to wonder where the line of demarkation is between high finance and good law. If we could get rid of the old offender, all these troubles would vanish.

It is not to be hoped, of course, that any State acting singly will indulge in reforms of this character, as it would tend to drive corporations elsewhere, but if a substantial number of States were to join, something might be accomplished toward a reformed code of corporation law. Of course, capital stock is not the only subject that needs attention, but it is one of them. The protection of minority stockholders from majority control; holding stock in other corporations, and the restriction of their powers, are subjects equally important. "Capital stock," however, should go.

R. H. GWYNNE.

Cases of Interest.

RIGHT TO POLL JURY, WHEN LOST. — In Vaughan *v.* State, (Ga.) 71 S. E. Rep. 945, it was held that the right to poll the jury is lost as soon as the jury have dispersed and again become a part of the general public; and that where the accused in a criminal case consents that the jury may disperse when they have found their verdict, and they do separate and disperse, leaving the verdict in the possession of the foreman to be returned into court next morning, the right to poll the jury is lost, and cannot be asserted by any reassembling of the jury when the verdict is delivered by the foreman to the clerk of the court in pursuance of the agreement.

LIABILITY OF RAILROAD OWNING MAJORITY OF STOCK OF ANOTHER RAILROAD FOR ITS ORDINARY DAILY OPERATION. — In Stone *v.* Cleveland, etc., R. Co., (N. Y.) 95 N. E. Rep. 816, it was held that evidence did not make one railroad corporation responsible for the ordinary daily operations of another, when it disclosed that the first owned a majority of the capital stock of the latter

and thereby controlled its corporate organization, which, however, remained legally distinct and separate, and by reason of such stock control or other influence had assembled the latter road with others into a transportation "route" or system which was advertised and known by its name; especially when, in addition to the facts thus summarized, it appeared that the subordinate railroad in all respects maintained its corporate identity, made its own contracts, kept its own accounts, collected its own revenues, and paid its own operating expenses, and that the only financial interest of the controlling road was by way of dividends on its stock.

CARE REQUIRED OF "SIGHT-SEEING AUTOMOBILE." — In Hinds *v.* Steere, (Mass.) 95 N. E. Rep. 844, which was an action of tort for personal injuries suffered by the plaintiff in a collision on the highway betwen a "sight-seeing automobile" owned by the defendant, on which the plaintiff was riding as a passenger, and an electric car, it was contended by the defendant that she was not a common carrier of passengers within the legal meaning of that term, but was a private carrier, and therefore that she was not liable for failing to exercise the high degree of care required of a common carrier of passengers. The court held, however, that whether in a strictly technical sense the defendant could be regarded as a common carrier of passengers or not, she was bound to use reasonable care according to the nature of the contract, and that in view of the nature of the business and the peril to life and limb of the passengers likely to arise from an accident, this reasonable care should be defined as the highest degree of care consistent with the proper transaction of the business.

NECESSITY OF FORMAL COMPLAINT BY INJURED PARTY IN PROSECUTION FOR ADULTERY. — In State *v.* La Bounty, (Wash.) 116 Pac. Rep. 1073, it was held that under a statute providing that no prosecution of adultery should be commenced except on complaint of the husband or wife, a formal complaint by the injured party was necessary, and that a prosecution instituted by information sworn to by the prosecuting attorney was insufficient. The court said: "The pertinent question is, Was the provision of the statute above cited intended to be mandatory in its nature, making a formal complaint by the husband or wife a prerequisite to the procedure prescribed? or was it intended simply to be a rule of evidence, the sufficiency of which could be submitted to the jury as a question of fact? We are inclined to the view first above expressed. Before the passage of this law by the legislature of 1909, the procedure governing the particular crime was not differentiated from the procedure in criminal actions generally; but the evident intention of the legislature which incorporated the proviso in the law was to prohibit intermeddling, evidently regarding the commission of this particular act as a crime against the husband or wife personally rather than as a crime against society, leaving the husband or wife at liberty to condone the offense if he or she desired so to do, unembarrassed by the publicity incident to a prosecution instituted by the officers of the State."

CONSTRUCTION OF STATUTE RELATING TO DOING OF BUSINESS BY FOREIGN CORPORATIONS. — In State *v.* Creamery Package Mfg. Co., (Minn.) 132 N. W. Rep. 268, it was held that under a statute providing that every foreign corporation admitted to transact business in Minnesota, that was guilty of entering into any pool, trust agreement, combination, or understanding in restraint of trade, within that State, should thereafter be prohibited from continuing its business therein, the court had no discretion, after the corporation was found guilty in an action begun and conducted under said sections, to grant any other or different judgment than one prohibiting the corporation from continuing its business within the State. The court said: "It seems very clear that the legislature did not intend that the court should have any discretion in regard to the punishment. It would have been easy to have used words indicating that the court might exercise its discretion, but difficult to express more clearly the idea that the whole matter of the penalty was taken from the court and determined by the legislature. We cannot avoid the conclusion that we could be justly accused of legislating, were we to hold that, notwithstanding the plain language of the statute, the court may impose a less punishment, or render a judgment that would permit defendant's continuing its business within the State. We do not feel warranted in holding that the word 'shall' should be construed as 'may' in this case. It is quite apparent that the legislature meant 'shall.' The statute is mandatory in its terms, and there is nothing that leads us to believe that it was not intended to be mandatory in effect."

VALIDITY OF ORDINANCE REQUIRING REMOVAL OF HATS AT THEATRES. — In Oldknow *v.* Atlanta, (Ga.) 71 S. E. Rep. 1015, it was held that a municipal ordinance which made it the duty of proprietors, lessees, or other persons in charge of opera houses or theatres, moving picture shows, or vaudeville performances or similar exhibitions, to require ladies who attend the performances in such places to remove their hats before the performance begins and to keep them off during the performance, reasonably construed, was within the police power of the municipality, and was authorized under a "general welfare clause" in its charter which confers upon it the power to pass ordinances "for the prevention and punishment of disorderly conduct, and conduct liable to disturb the peace and tranquillity of any citizen or citizens thereof," and such as "may seem to [it] proper for the security of the peace, health, order, and good government of said city." The court said: "The plaintiff in error in this case was proprietor of what is known as a 'moving picture show' in the city of Atlanta. This character of amusement has become one of the most popular methods of recreation and pleasure, and is resorted to almost universally by all classes of citizens. The business is clearly lawful, as well as entertaining, and sometimes instructive, and the public has the right to resort to these places, and, while there, to be protected in the full enjoyment furnished by this class of entertainment. It is a matter of common knowledge that the style of modern hats worn by ladies, if permitted to be worn by them while the performance is in progress, will prevent those who may be so unfortunate as to sit in the rear of ladies from seeing the stage or from enjoying the spectacular entertainment there presented, which is a most important part of the performance. Nothing more greatly mars the pleasure of an entertainment, or disturbs the comfort of those who may be so unfortunate as to be located behind these obstructions, or more irritably disturbs or interferes with the comfort of the audience attending the theatres or moving picture shows, than those large hats worn by ladies, which in many cases completely obstruct the view of the performance. The spectacular is the principal part of moving picture shows. The evil aimed at by this ordinance, the mischief it was intended to prevent, and the nuisance it was passed to abate, all clearly show that the ordinance in question is within the police power of the city and is authorized by the 'general welfare clause' of its charter."

NECESSITY OF GUILTY KNOWLEDGE BEING AN INGREDIENT OF CRIME. — In Kilbourne *v.* State, (Ohio) 95 N. E. Rep. 824, it was held that that part of a statute entitled "An Act to protect railway property and guard against personal injuries," and which provided that "whoever buys, receives, or unlawfully has in his possession any of the aforesaid articles [referring to journal brasses, nuts, bolts, etc., removed from railway cars, etc.] shall, upon conviction thereof, be imprisoned," was constitutionally invalid because guilty knowledge was not made an

ingredient of the crime. The court said: "As early as Birney *v.* State, 8 Ohio 230, guilty knowledge was held to be a necessary ingredient of crime. It is true that that case arose from the violation of a statute prohibiting the harboring or secreting a slave. There were several counts in the indictment which we need not specialize further than to say that the statute forming the basis of prosecution provided that, 'if any person shall harbor or secrete any black or mulatto person, the property of another, the person so offending shall, on conviction thereof, be fined in any sum,' etc. It is observed that *scienter* is not made part of the statutory description, and that fact was important in determining the case. On page 238 of 8 Ohio, Wood, J., speaking for the court, says: 'There is no averment that the plaintiff in error knew the facts alleged, that Matilda was a slave, and the propery of L. Larkin, or of any other person; and such is not the legal inference in a State whose constitution declares that all are born free and equal. . . . On the contrary, the presumption is in favor of freedom. The *scienter*, or knowledge of the plaintiff in error, of this material fact, was an ingredient necessary to constitute his guilt. This knowledge should have been averred in the indictment, and proved on the trial, for without such knowledge the act charged as a crime was innocent in its character. We know of no case where positive action is held criminal, unless the intention accompanies the act either expressly or necessarily inferred from the act itself. It is true that the statute upon which the indictment is founded omits the *scienter*, and the indictment covers all the facts enumerated in the statute. But this is not sufficient. It cannot be assumed that an act which, independent of positive enactment, involves no moral wrong, nay, an act that in many cases would be highly praiseworthy, should be made grievously criminal when performed in total unconsciousness of the facts that infect it with crime. . . .' We think this early pronouncement by this court is yet sound law and states a rule pertinent to the present controversy, and is as applicable to the business habits and rights of our citizens to-day as to the right of a citizen under the fugitive slave statute."

VALIDITY OF ORDINANCE AIMED AT KEEPING CERTAIN GOODS EXPOSED FOR SALE, FROM FLIES. — In *Ex p.* Bacigalupo, (Minn.) 132 N. W. Rep. 303, it was held that an ordinance which read: "All berries, cherries, dates and figs exposed for sale in any store, shop or building shall be protected from flies, and all fruits, berries and candies exposed for sale outside of the building, or in any wagon or cart, shall be protected from both flies and dust," was not an unnecessary interference with private rights, and was not an unreasonable requirement, or impossible of performance, and was not in restraint of trade, or contrary to the provisions of the State or Federal Constitution. The court said: "Properly construed, the ordinance is not designed to be burdensome, and it ought to be possible to provide some method of adequate protection without depriving exhibitors of the right to display their goods in the open. It may not be possible to completely protect fruit from dust, unless it is isolated in such a manner as to keep out the air; and, of course, that would result in the deterioration of the fruit, if kept confined too long. A fair meaning of its provisions is that fruit kept on exhibition on the outside of a building shall be no more exposed to dust than when it is kept on the inside of a building. The ordinance contemplates that every reasonable precaution should be taken to protect fruit from dust and flies when exposed in the open, and at the same time not result in its deterioration for lack of air. If experiment determines that this result is not possible without shortening the time to which fruit shall be confined, then such inconvenience as may result from it must be assumed by the fruit vender. The ordinance is bitterly criticised because its provisions include all fruits, such as oranges and bananas, which it is claimed require no protection. While, no doubt, a distinction may be drawn between such fruits and others, such as berries, it is not for the courts to say that even oranges and bananas should not be protected against the accumulation of dust and the approach of flies. Surely even those fruits are much more wholesome and less dangerous in scattering germs when kept free from flies and dust. Something may be said in opposition to the enforcement of such restrictions in the case of wholesale or commission houses, where boxes are opened and exposed for the temporary purpose of displaying the contents to prospective purchasers. Here again the court cannot interfere and declare the ordinance void for uncertainty, or as an infringement upon the personal rights of such merchants, merely because it will create an inconvenience in their method of conducting business. If experience shows or develops the fact that the enforcement of the ordinance seriously interferes with the conduct of the business of those merchants, redress must be sought with the legislative power, and not with the courts."

ADMISSIBILITY OF EVIDENCE FURNISHED BY BLOODHOUNDS. — In State *v.* Adams, (Kan.) 116 Pac. Rep. 608, the rule is laid down that before evidence of the conduct of bloodhounds alleged to have been put upon the trail of the defendant can properly be received, it should appear that the dogs in question were able, at the time and under the circumstances, to follow the scent or track of a person. And the court held that when such foundation had been laid and the evidence showing the conduct of the dogs had been received, a charge, in substance, that, before the jury could consider such conduct, they must find that the dogs in question were accurate, certain, and reliable in following the trail of human footsteps, and, if they found from the evidence touching the matter that they were reliable and accurate in this regard, then the evidence of their work and its result might be considered together with all the other evidence in the case, as a circumstance determining the guilt of the defendant, was not prejudicially erroneous as to such defendant. The court said: "Bloodhound evidence has been viewed differently by different courts. The Supreme Court of Nebraska in Brott *v.* State, 70 Neb. 395, 97 N. W. Rep. 593, 63 L. R. A. 789, repudiates such evidence as incompetent and dangerous. Other courts have given various expressions as to the foundation necessary to be laid in order to render such evidence competent. . . . In State *v.* Hall, 4 Ohio Dec. 147, the subject is treated historically, and the use of bloodhounds for scenting and tracking enemies or fugitives is shown to have been in vogue hundreds of years ago. It was there held that bloodhounds trained to follow human tracks could be shown to have been put upon the scent or track of a person twenty-four hours after a burglary at the building or at a place where stolen property was concealed, and that they followed such track or scent up to the door of the defendant. In State *v.* Dickerson, 77 Ohio St. 34, 82 N. E. Rep. 969, 122 Am. St. Rep. 479, the Supreme Court of Ohio goes at length into the leading cases and the different rules laid down, and deduces the following as the correct one: 'It is apparent that, before the acts and conduct of the dog can be shown, a proper preliminary foundation must be laid, and, to establish such foundation, it must be shown that the particular dog used was trained and tested in tracking human beings, and by experience had been found reliable in such cases; that the dog so trained was laid on a trail, whether it was visible or invisible, at a point where the circumstances tended clearly to show that the guilty party had been, or upon a track which the circumstances indicated to have been made by him. In addition to this, the reliability of the dog must be proved by a person or persons having personal knowledge thereof.'"

Improper Discharge of Jury Resulting in Defendant Being Put in Jeopardy. — In People *ex rel.* Stabile *v.* Warden of City Prison, 202 N. Y. 138, *affirming* 139 N. Y. App. Div. 488, it was held that where, after the jury upon a murder trial had deliberated less than five hours, the trial judge, without consultation with defendant or his counsel, and without defendant or his counsel being informed of the purpose thereof, and without the jury requesting it, summoned the jury into court and asked the foreman if they had agreed upon a verdict, to which the foreman replied, "Not as yet," whereupon the judge discharged them, such discharge was not a reasonable exercise of the power vested in the courts by section 428 of the Code of Criminal Procedure, which provides that "after the jury had retired to consider of their verdict they can be discharged before they shall have agreed thereon . . . when, after the lapse of such time as shall seem reasonable to the court, they shall declare themselves unable to agree upon a verdict; or when, with the leave of the court, the public prosecutor and counsel for the defendant consent to such discharge." The court further held that the result of the improper discharge was to entitle the defendant to his liberty, as he had been once placed in jeopardy. The court said: "The discharge of the jury necessarily rests upon the statutory authority contained in the second subdivision of said section. The right was, therefore, dependent upon the jury having declared themselves unable to agree upon a verdict. The jury did not declare themselves unable to agree upon a verdict, either in terms or by any fair inference. They were in the midst of their deliberations upon the case when, without a suggestion from them, and without the defendant or his counsel being informed of the purpose thereof, the judge presiding at the trial arbitrarily directed them to come before him. Upon their appearance before him they were not asked whether they were able to agree upon a verdict, but as to whether they had in fact agreed, in language as follows: 'Mr. Foreman, have you agreed upon a verdict?' If the jury had responded through their foreman by a simple negative, it could not by any fair construction be said to have been a declaration of inability to agree. The answer in this case, however, includes much more than a simple negative. When the foreman said in answer to the question by the trial judge, 'Not as yet,' he clearly indicated that the jurymen had not completed their discussion and deliberation in an effort to reach a verdict, and that they were in the midst of such discussion and deliberation and that they required further time before they could determine whether they were able to agree upon a verdict. The reply included by implication a hope and perhaps even an expectation of an agreement. It is suggested by the district attorney that the simple fact that the jury had not as yet agreed carried with it necessarily the fact that they were at that time unable to agree. If the jurymen had been asked five minutes after the submission of the case to them and before they had had any discussion or deliberation upon the verdict that should be rendered in the case, whether they had agreed upon a verdict, the answer would necessarily have been substantially the same as that given to the question asked by the court. Such an answer would be appropriate and true in every case from the moment it was submitted to a jury until a verdict was reached. It would have been true if the last ballot taken before they were directed to come before the court had resulted in eleven votes for acquittal and one in some doubt leaning toward an acquittal. In this case, at the time the jury was discharged, ten jurors had voted for an acquittal, while the other two then favored a conviction for a lesser offense than that for which the relator was charged in the indictment. . . . Where a jury is arbitrarily discharged in a criminal case without the consent of the defendant, and no circumstances exist calling for or permitting the exercise of a discretion by the court, the defendant has by reason of the trial that thus comes to a sudden end been placed in jeopardy within the constitutional provision, and such discharge is a reason within the Constitution why the defendant should not be again brought to trial upon the same indictment."

News of the Profession.

The National Association of Probate Judges held its second annual meeting at Detroit, Mich., on September 12, 13 and 14.

Massachusetts Judge Named. — Anthony W. Reddy of Amesbury has been appointed judge of the Second District Court of Massachusetts.

The Missouri State Bar Association held its annual meeting on September 22 and 23 at Kansas City, Mo. Further particulars will be given in our next issue.

The Only Woman Dean of a Law School in the world is Mrs. Ellen Spencer Mussey, of Washington, D. C. She occupies the chair of dean of the Washington College of Law.

New Maryland Judge. — Governor Crothers has appointed Walter I. Dawkins associate judge of the Supreme Bench of Baltimore City to succeed the late Judge George M. Sharp.

Federal Judge Resigns. — The resignation of Judge Rasch of the United States District Court of Montana has been received by President Taft. The cause of Judge Rasch's resignation was not made known to the President.

Ohio Judge Resigns. — Hon. Charles S. Reed, for more than twelve years judge of the Ohio Court of Common Pleas in the first division of the fourth district, has sent his resignation to Governor Harmon. He expects to become the head of a law firm in Cleveland.

The New Mexico Bar Association held its annual meeting at Albuquerque, N. Mex., on August 28 and 29. J. M. Hervey, of Roswell, former attorney-general, presided in the absence of C. A. Spiess of Las Vegas, and was elected president of the association for the ensuing year.

The District and County Attorneys' Association of Texas met in annual session at Mineral Wells, Tex., on August 7 and 8. The election of officers resulted as follows: President, Dayton Moses of Burnet; vice-president, R. M. Johnson of Palestine; secretary and treasurer, R. E. Underwood of Amarillo.

North Dakota State Bar Association. — The annual meeting of the State Bar Association of North Dakota was held at Wahpeton on September 5 and 6. The address of President A. A. Bruce was on the subject, "The Courts and Judicial Legislation." The annual address was delivered by Hon. Orrin Carter, chief justice of the Illinois Supreme Court, his subject being "Courts of Review."

Former Canadian Judge Dead. — Edward Jarvis Hodgson, formerly master of rolls in chancery, and assistant judge of the Supreme Court of Prince Edward Island, died at Charlottetown, P. E. I., on Aug. 13, at the age of seventy-one. Mr. Hodgson was called to the bar in 1864 and was appointed judge in 1891. He was one of the best criminal lawyers in the maritime provinces and for many years was chancellor of King's College, Windsor.

Negro Bar Association. — A National Negro Bar Association was organized at Little Rock, Ark., on Aug. 17. There were present about fifty lawyers from all parts of the country who took part in the organization. The following officers were elected: President, J. T. Seattle, Memphis, Tenn.; vice-presi-

dent, J. Madison Vance, New Orleans, La.; secretary, P. W. Howard, Jackson, Miss.; treasurer, W. G. Andrews, Sumter, S. C.

New Law School in Iowa. — A new law school has been opened in Des Moines, Ia., in connection with the Capital City Commercial College. It is known as the Des Moines College of Law and will confer the usual degree. Judge Lawrence De Graff of the equity division of the Polk county district court is president of the school and J. A. Dyer is dean. Associated with Judge De Graff and Mr. Dyer are J. E. Holmes, I. D. Burkheimer, and B. F. Williams of the Commercial College. All lectures are given at night.

Worcester Lawyer to Be University Instructor. — Dr. Thomas C. Carrigan, member of the Worcester (Mass.) bar, who received the degree of doctor of philosophy from Clark University last June, has accepted an offer to enter the faculty of the Catholic University of America in Washington, as an assistant to Dr. Thomas E. Shields, who is the head of the department of education. At the same time Dr. Carrigan will be an instructor in the law school connected with the university.

Minnesota Bar Association Committees. — C. A. Severance, president of the Minnesota State Bar Association, has announced the standing committees of the association for the coming year. The chairmen are: G. W. Stewart, St. Cloud, legal ethics; Stiles W. Burr, St. Paul, jurisprudence and law reforms; Edward Lees, Winona, uniform State laws; George W. Buffington, Minneapolis, judicial districts; Charles C. Wilson, Rochester, library; Ambrose Tighe, St. Paul, legal education; John Moonan, Waseca, legislation; H. V. Mercer, Minneapolis, workmen's compensation. Other members of the latter committee, whose duty it is to draft a proposed employers' liability law for Minnesota, are W. D. Mitchell, St. Paul; J. L. Washburn, Duluth; Charles Loring, Crookston, and Henry Morgan, Albert Lea.

Death of Noted Legal Author. — John Townshend, lawyer and author of several legal works, died on Aug. 11 at his home in New York city. He was born in New Buckingham, Norfolk, Eng., on Sept. 19, 1819, and came to New York in January, 1848. He published in May of the same year his "New Practice of Civil Actions in Courts of Judicature in the State of New York as Established by the New Code of Procedure." This work gave him a standing at the bar, and ran through ten editions. The second edition was published under the briefer title of "The Code of Procedure." He also was the author of a treatise on "Slander and Libel," which was first published in 1868, and has gone through five editions. In addition he published a book of forms and many other works on legal topics and on subjects of interest to antiquarians. As president of a cremation society he became interested in sepulchral literature, and probably had a copy of every work published regarding epitaphs.

New Dean of Iowa Law School. — Austin W. Scott, son of Dr. Austin Scott, former president of Rutgers College, has accepted the position of dean of the Law School of the University of Iowa, at Iowa City. Professor Scott was graduated from Rutgers in 1903, and studied law at Harvard, afterwards becoming an instructor in the Harvard Law School, from which institution he goes to the Iowa University. The Iowa Law School has on the average about two hundred students, and the position is a very responsible one and an honor of no small account for Professor Scott.

Death of Massachusetts Judge. — Judge James Bailey Richardson, for nineteen years on the bench of the Massachusetts Superior Court, died at his summer home in Oxford, N. H., on August 30. Judge Richardson was born in 1832, at Oxford, N. H. In 1857, at the somewhat advanced age of twenty-five, he took his degree at Dartmouth, and in February, 1859, was admitted to the bar at Boston. Early during his career as a lawyer he was offered seats in the Boston Municipal and Superior Courts, but declined. In 1889, however, he was appointed corporation counsel of the city of Boston by Mayor Hart. While serving in this capacity he gave important opinions regarding the rights of the State legislatures and Congress in the navigable waters of the Charles river. Later he was appointed by Mayor Matthews a member of the rapid transit commission. In 1884, together with ex-Mayor Cobb and James M. Bugbee, he was appointed to revise the city charter. Finally, in 1892, he was appointed an associate justice of the Superior Court.

Virginia Bar Association. — The twenty-third annual convention of the Virginia Bar Association, of which brief mention was made in the September issue of Law Notes, was held on Aug. 8, 9, and 10 at Hot Springs, Va. Judge George L. Christian of Richmond, president of the association, delivered the annual address, his subject being the judicial administration of Chief Justice Roger Brooke Taney. Other addresses were as follows: by Professor Raleigh C. Minor, of the University of Virginia, on "Centralization *versus* Decentralization;" by Judge A. W. Wallace, of Fredericksburg, on "The Life and Character of Lord Brougham;" by Walter H. Taylor, of Norfolk, on "Abolition of Jury Trials in Civil Cases;" and by Helm Bruce, of Louisville, Ky., on "A Permanent International Court." The following officers were elected: President, J. F. Bullitt, of Big Stone Gap; vice-presidents, A. R. Long, of Lynchburg, and J. S. Harnsberger, of Harrisonburg, to represent the Valley section; E. Chambers Goode, of Mecklenburg county, to represent Southside; A. S. Higginbotham, of Tazewell, to represent the southwestern section; and Hugh W. Davis, of Norfolk, to represent the Tidewater section; secretary and treasurer, John B. Minor, of Richmond.

Southern Lawyer and Soldier Dead. — General George W. Gordon, commander-in-chief of the United Confederate veterans and member of Congress, died at his home in Memphis, Tenn., on Aug. 9. His illness dated from his last political campaign, when he was re-elected to the House of Representatives, the last general of the Confederacy to serve in that body. George Washington Gordon was born in Giles county, Tenn., Oct. 5, 1838. As a youth he entered the Western Military Academy, from which he was graduated in 1859. At the outbreak of the Civil War he enlisted. Within a few weeks he was made a captain, and was later promoted to be lieutenant colonel, and in about a year was commissioned colonel. In 1864 he was named brigadier general. He participated with distinction in a number of engagements and at one time was taken prisoner. At the close of the war General Gordon studied and practiced law, becoming attorney-general of Shelby county, Tennessee. In 1885 he was connected with the federal department of the interior and was elected a member of the Sixtieth Congress from the Tenth Tennessee district, and re-elected to the Sixty-first and Sixty-second Congresses.

Eastern Montana Bar Association. — The sixth annual session of the Eastern Montana Bar Association was held on August 21 and 22 at Hunter's Hot Springs, Mont. The meeting was opened with an address by President John T. Smith, of Livingston. Other addresses were as follows: "Should Judicial Officers Be Subject to the Recall?" O. F. Goddard, of Billings; "Initiative, Referendum and the Recall," Judge E. K. Cheadle, of Lewistown; "Should a Court of Last Resort Decide a Case on a Point Not Raised by Counsel without First Calling for Further Argument?" Judge G. W. Pierson, of Billings; "Should Any Act of Congress or of a State Legislature Be

Held Unconstitutional Except by the Unanimous Assent of All the Judges Constituting the Court?" Fred L. Gibson, of Livingston; "How and When Should Judges of Courts Be Selected?" H. C. Crippen, of Billings; "The Best Method of Simplifying the Appellate Procedure of Our State," Chief Justice Brantly; "Reasonable Doubt," Justice J. M. Clements; "Is Fatigue a Symptom or a Disease?" Dan Yancey, of Livingston.

PROMINENT NEW YORK LAWYER DEAD. — James Russell Soley, formerly assistant secretary of the navy, member of the New York Bar, and author, died at New York city on September 11. Soley was born in Boston on Oct. 1, 1850, and was graduated from Harvard. In 1872 he went to the United States Naval Academy as professor of law and history. He continued in that capacity until 1890, when he was appointed assistant secretary of the navy, a position he held for three years. Soley came to New York when he left the Navy Department and began the practice of law. He was a recognized authority on international law and was counsel to Venezuela in the arbitration in Paris of the boundary dispute between that country and British Guiana. Soley also was the lecturer on international law in the Naval War College in Newport, R. I. For almost ten years he was an active member of the firm Tracy, Boardman & Platt. Among the works published by Soley were: "History of the Naval Academy," 1879; "Foreign Systems of Naval Education," 1879; "The Blockade and the Cruisers," 1883; "Rescue of Greely," which he wrote in collaboration with Admiral Winfield S. Schley, 1895; "Boys of 1812," 1887; "Sailor Boys of '61," 1888, and "Life of Admiral Porter," 1908.

UNIFORM CODE OF ETHICS. — The People's National Legal Ethics Society, whose national headquarters are at 50 Church street, Manhattan, have issued the following petition, which has been sent throughout the country for the signatures of judges, lawyers, educators, and citizens generally: "We, the undersigned, favor a national campaign of education for the adoption and enforcement of a uniform code of ethics by lawyers and courts of the United States, to enforce impartially law against lawyers as well as against laymen, to check and punish corrupt practices within the legal profession of those who by their misconduct bring mistrust and opprobrium upon courts and lawyers." They hope to improve the condition of the law courts by conducting a permanent campaign of education throughout this country for the adoption and enforcement of a uniform code of ethics by the lawyers and courts of every community. A letter in the shape of a seventeen page brief, on "The Status of Ethics of the Legal Profession throughout the United States," has been sent to each of the justices of the Supreme Court of the United States at Washington, D. C., and to President William H. Taft, Governor Woodrow Wilson, Mayor William J. Gaynor, Theodore Roosevelt, the Rev. Dr. Lyman Abbott, the Rev. Dr. Charles C. Pease, the Rev. Madison C. Peters, John R. Dos Passos, Judge Francis J. Swazey, William T. Hunt; Editor Call, Newark, N. J.; Judge R. M. Wanamaker, Columbus, Ohio; Congressman J. F. Clarkson, Tarrytown, N. Y.; District Attorney Henry A. Wise, Judge Thomas I. Chatfield, the judges of the Appellate Division of the Supreme Court of New York, Judge William L. Day, Judge William A. Babcock, and many others.

AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY. — Immediately following the adjournment of the American Bar Association the third annual meeting of the American Institute of Criminal Law and Criminology was convened in Huntington Hall, Boston. The delegates to the convention were welcomed by Governor Foss of Massachusetts. Interesting addresses were delivered by Nathan W. MacChesney of Chicago, president of the institute, by Professor George W. Kirchwey of Columbia University, and by Dr. Morton Prince of Boston. The institute elected officers as follows: President, John B. Winslow, Madison, Wis., chief justice of the Supreme Court of Wisconsin. Vice-presidents, Dr. Morton Prince, Boston, former president of the American Neurological Society and the American Psychopathological Society, and professor of neurology in Tufts Medical College; Judge Charles A. De Courcy of the Massachusetts Superior Court; Professor George W. Kirchwey, New York, professor of law in Columbia University; Professor James W. Garner, Urbana, Ill., professor of political science in the University of Illinois; Harvey C. Carbaugh, Chicago, colonel and judge advocate, United States Army, Western Division. Treasurer, Bronson Winthrop, New York. Secretary, Eugene A. Gilmore, Madison, Wis., professor of law in the University of Wisconsin. Executive board — chairman, Professor John H. Wigmore, Chicago; William O. Hart, New Orleans; Professor William E. Higgins, Lawrence, Kan.; William A. White, Washington, D. C.; Professor William E. Mikell, Philadelphia; Eugene Smith, New York; Frederick B. Crossley, Chicago; Robert H. Gault, Evanston, Ill.; Professor Edwin R. Keedy, Chicago; Judge Nathan William MacChesney, Chicago; Judge E. Ray Stevens, Madison, Wis.; Judge Alexander H. Reed, Wausau, Wis.; Judge Neele B. Neelan, Milwaukee; Professor Edward A. Ross, Madison, Wis.; Dr. Seaman, Milwaukee; Dean Henry M. Bates, Ann Arbor, Mich., dean of the Law School of the University of Michigan.

AMERICAN BAR ASSOCIATION. — The thirty-fourth annual convention of the American Bar Association was held at Boston, Mass., on August 29, 30, and 31. A pleasing addition to the program of speeches printed in the September number of LAW NOTES was an address by President Taft. A resolution denouncing the principle of the recall of judges was adopted by a large majority. It declared that "the application to judges of the principle of recall would create a judiciary whose decisions would not rest upon the law of the land, but would be influenced by transient public sentiment, and that the establishment of such a judiciary would be destructive of our system of government." The committee which drew up the resolution consisted of former presidents of the association and included former Secretary of War Dickinson and Alton B. Parker of New York. It was voted that the president of the association should appoint a committee representing each State and Territory "to take such steps as the committee deemed best to expose the fallacies of judicial recall." In connection with the Bar Association convention, several allied bodies or subdivisions of the association held independent sessions. At the meeting of the Comparative Law Bureau, Governor Simeon E. Baldwin of Connecticut presided and delivered an address. The Commissioners on Uniform State Laws held their twenty-first annual conference and reported resolutions for indorsement by the Bar Association in relation to wife and child desertion, and to the probating in one State of wills made in another State. The section of Legal Education was presided over by Francis Rawle of Philadelphia. Speeches were made by Henry Wade Rogers, dean of the Yale Law School, and papers by Frederick R. Coudert, Governor Simeon E. Baldwin, and Hollis R. Bailey were read. At the meeting of the Association of American Law Schools, Baron Uchida, Japanese ambassador to the United States, spoke on "The Teaching of Jurisprudence in Japan." The section of Patent, Trademark, and Copyright Law also held an important meeting. The convention was brought to a close with a banquet at which James M. Beck acted as toastmaster. Addresses were made by Samuel T. Elder of Boston on "What's the Constitution between Friends?" by Albert W. Briggs of Tennessee on "The Swing of the Pendulum;" by Stephen S.

Gregory of Illinois on "The Incoming President;" by William F. Gurley of Nebraska on "The Lawyer's Responsibility under Modern Legislation;" and by Ferdinand Williams of Maryland on "Legal Ethics." The following were elected officers of the association for the ensuing year: President, Stephen S. Gregory, Illinois; secretary, George Whitelock, Maryland; treasurer, Frederick E. Wadhams, New York; executive committee, Edgar H. Farrar, Louisiana; John Hinkley, Maryland; Lynn Helm, California; Ralph N. Breckinridge, Nebraska; Hollis R. Bailey, Massachusetts; Aldis B. Brown, District of Columbia.

DEATHS. — In addition to those mentioned above, the following deaths in the profession have occurred since our last issue: Hon. Charles A. Babbitt, Fitchburg, Mass.; David W. Baird, Louisville, Ky.; Myron E. Bartlett, Warsaw, N. Y.; Justice B. D. Bell, Lexington, Ky.; James Kingsley Blake, New Haven, Conn.; Judge Joseph D. Boyd, Griffin, Ga.; Bartholomew H. Burrell, Vallonia, Ind.; Clarence Cary, New York city; Harry T. Chivers, Sour Lake, Tex.; Fleet R. Cooper, Clinton, N. C.; Charles L. Corbin, Metuchen, N. J.; George W. Cormany, Cincinnati, O.; Capt. George W. Cross, Manchester, Tenn.; Robert Frank Cross, Knoxville, Tenn.; Joseph M. Dorr, Des Moines, Ia.; William D. Ferguson, Chicago, Ill.; Judge George Fielder, Brooklyn, N. Y.; William Fletcher, Washington, D. C.; Judge M. D. Follett, Marietta, O.; Judge R. A. S. Freeman, West Point, Ga.; Horace Graves, Brooklyn, N. Y.; Charles T. Greene, Omaha, Neb.; William F. Haggerty, Webster, Mass.; Reuben Haines, Elkton, Md.; Dr. John J. Harlan, Alexander City, Ala.; Theodore H. Hawley, Denver, Colo.; J. Adair Herman, Carlisle, Pa.; Guy A. Hildreth, Gardiner, Me.; S. G. M. Hollopeter, Philadelphia, Pa.; Frank H. Hubbell, Angola, N. Y.; Charles W. Hurlburt, New York city; Edward B. Kear, Yorktown Heights, N. Y.; Col. Washington L. Ledgerwood, Knoxville, Tenn.; Charles E. Logan, Cincinnati, O.; Judge C. D. Martin, Lancaster, O.; Frederick A. Martin, Red Hook, N. Y.; Henry J. McCormick, Chatham, N. J.; Wilson R. Mendell, Brooklyn, N. Y.; Oscar B. Mowry, Brookline, Mass.; Col. D. A. Nunn, Crockett, Tex.; Harry Overington, Rockaway Beach, N. Y.; Irving W. Parker, Portland, Me.; Ex-Judge Clement B. Penrose, Avon, N. J.; Edward L. Perkins, San Francisco, Cal.; George H. Perry, San Francisco, Cal.; Charles H. Phillips, Brooklyn, N. Y.; J. Clarence Price, Washington, D. C.; Charles A. Renwick, Grand Rapids, Mich.; Alden L. Roadarmour, Gallipolis, O.; Andrew J. Sawyer, Sr., Ann Arbor, Mich.; J. Heywood Sawyer, Elizabeth, N. J.; Lindley M. Scarborough, Jacksonville, Fla.; Charles M. Sherman, Chicago, Ill.; Judge J. M. Stewart, Xenia, O.; John Parker Teagarden, Waynesburg, Pa.; Charles Tindall, Shelbyville, Ind.; Judge George W. Warren, Louisville, Ga.; William Rotch Wister, Germantown, Pa.

English Notes.

REGULATION OF AERIAL TRAFFIC. — The French government has decided to submit to Parliament when it reassembles in the autumn a bill for the regulation of aerial traffic in France. The authorities consider that it is incumbent upon France, as the country which has taken the lead in aeronautics, to show the way in this matter. Pending the adoption of the bill by Parliament the Minister of Public Works, whose department is in charge of the proposals which were recommended by last year's International Aerial Navigation Conference in Paris, will issue by decree a set of provisional regulations. — *Law Times.*

LORD CHANCELLOR OF IRELAND DEAD. — The Right Hon. Sir Samuel Walker, Lord Chancellor of Ireland, died on Aug. 13 in Dublin. For some time past he had been in failing health, but it was hoped that he would be able to resume his duties at the Four Courts at the end of the Long Vacation. Sir Samuel Walker was born in 1832, and was educated at Portarlington School, from which he passed to Trinity College, Dublin. He was called to the bar at the Easter Sittings in 1855, and his career was one of uninterrupted progress. In 1872 he "took silk," and in 1881 was made a Bencher of King's-inns. In 1883 he was appointed Solicitor-General for Ireland, and two years later, in 1885, he was advanced to the office of Attorney-General for Ireland. In 1892 he was appointed Lord Chancellor of Ireland, and three years later he was appointed a Lord Justice of Appeal, an office which he continued to fill until 1905, becoming Lord Chancellor for the second time in the latter year. He was created a baronet in 1906.

WHIST PLAYING AS GAMBLING. — Judge Bray was recently asked at Bloomsbury County Court to decide whether whist playing is gambling. The question arose out of an action brought by Mr. A. J. Norton to recover £10 from the Ideal Whist Company, of Oxford street, W., being the first prize won by him at a whist drive. The company claimed that Mr. Norton could only exchange the coupon for furniture at a certain shop, and Mr. Norton claimed the right to spend the money at another shop. Mr. H. D. Samuels, counsel for the company, contended that the game of whist was gaming, and the case must be dismissed under the Gaming Act. Mr. Marpole, for Mr. Norton, replied that whist was a game of skill. Mr. Samuels pointed out that limericks had been held to be lotteries. "Surely," he added, "if a literary effort, bad as it is, can be held to be a gamble, cards are a lottery." The judge held that the Gaming Act constituted a good defense to the claim of the plaintiff.

LORD JAMES OF HEREFORD DEAD. — Lord James of Hereford died suddenly of heart failure, at Epsom, on Aug. 18, in his eighty-third year. He was born in 1828, and was the son of a Hereford surgeon. He was educated at Cheltenham College, was prizeman at the Inner Temple in 1850–51, and was called in 1852. In 1867 he was Postman in the Exchequer, an office now extinct. Taking silk in 1869, he soon became one of the men who divided the commercial work at Guildhall. In 1873 he became Solicitor-General, and in 1873–74, and subsequently in 1880–85, he was Attorney-General. His colleagues were Sir William Harcourt and the late Lord Herschell. One of his greatest efforts as an advocate was his reply in the Parnell Commission. Along with the present Lord Chief Justice, the late Mr. Murphy, Mr. (now Lord) Atkinson, and Mr. Ronan, of the Irish Bar, and the late Mr. William Graham, he was counsel for the *Times;* and it fell to him to reply, and his speech extended over twelve days. In the Unionist Administration of 1895–1900 he was Chancellor of the Duchy of Lancaster. He was raised to the peerage in 1895. Lord James was unmarried, and the peerage becomes extinct.

WORKMAN INJURED BY LIGHTNING ENTITLED TO COMPENSATION. — In the City of London Court, on Aug. 23, before His Honor Judge Lumley Smith, K. C., one of the most extraordinary cases under the Workmen's Compensation Act was heard, in which Albert E. Aston, packer, 15 Edith street, Great Cambridge street, Haggerston, claimed damages against Evans, Sons, Leecher Webb, Limited, druggists, 60 Bartholomew Close, E. C., for a peculiar accident that occurred to him. It seemed that on the evening of the 31st May (Derby day) Aston was accidentally locked in the warehouse of the defendants, by whom he was employed. A thunderstorm came on, and the lightning appeared to have had such an effect upon him that he was dazed when taken out of the warehouse and removed to the hospital. He was said either to have been struck by the lightning or to have suffered a nervous shock as the result of

finding himself locked in while the storm was raging. He was released the same evening. He was still incapacitated as the result of the injuries which he sustained, and claimed 9*s.* 6*d.* a week until he became well, that being half his wages. Defendants submitted to an award, and an order was made accordingly that 9*s.* 6*d.* weekly should be paid to Aston until further order.

A NEW AUTOMOBILE DANGER. — The report of an inquest at Marlborough furnishes some commentary on the perils of which the motor-car may seem to be the cause. A six-year-old child standing in the road was said to have suddenly burst into flames, and it was alleged that the cause was "a spark from a passing motor-car." Most people nowadays have sufficient knowledge of motor-cars to realize that they are unlikely to emit sparks such as are emitted from railway engines or dropped from the fire-boxes of steam tractors. A motor-car had, however, been backed out of a garage into the road, and accordingly tests were made upon it. The child was clothed in flannelette, and so a piece of this material was held close to the exhaust pipe and the engine raced. A second test followed in which the material was soaked in petrol. Still nothing happened. Supposing, however, a vicious backfire had chanced to come and had ignited the petrol, there can be small doubt but that coroner's juries in such cases would jump to the conclusion that a new peril had been discovered. There was no evidence apparently that the child was near the car, and none that its clothes had been previously soaked in petrol, and so the test is a remarkable one to enter into the conception of the coroner. Nor was there evidence of the motor misfiring or banging in the silencer when being backed into the road.

ACTION AGAINST ALLIED STEAMSHIP LINES. — The Government at Washington is preparing, says *Reuter*, to accelerate its suit under the anti-trust law against the thirteen steamship lines composing the Atlantic Conference. The charge against the conference is that it has attempted to monopolize steerage passenger traffic by an agreement signed in London in 1908. This suit was entered in the federal court by the United States Government in January last. The companies sued are the Allan, International Mercantile Marine, International Navigation, Anchor, Canadian, Pacific, Cunard, British and North Atlantic, Hamburg-Amerika, Holland-America, North German Lloyd, Red Star, White Star, and Russian East Asiatic lines. The United States District Attorney alleged that there was in existence a contract among the defendants, with the exception of the Russian line, entered into on the 5th Feb. 1908, in London, apportioning the steerage passenger traffic and providing for a system of fines in case of the percentage thus apportioned being exceeded. Doubts have all along been expressed as to the legality of the proceedings. It has been suggested that the American Government would be nonsuited as far as the British and other foreign lines are concerned, as it was contended that they could not be brought within the provisions of the Sherman law without violating treaty rights. A complaint against a German steamship line for violating the railway rate law was recently quashed by the Interstate Commerce Commission on the ground that it had no jurisdiction over foreign carriers. The announcement with regard to the commencement of the suit was received in British shipping circles at the time without any alarm, and it has been difficult to appreciate whether the object of the United States Government has been the reduction of steerage passengers' fares, or, indeed, what has been their motive in the matter.

THE REMEDY OF IMPEACHMENT. — The suggestion made by Lord Halsbury in his speech at the banquet recently given in his honor, that the remedy of impeachment might be available in the case of a minister who advised a misuse of the exercise of the prerogative of the Crown, is somewhat startling when it is recollected that there have been only two cases of impeachment in the last hundred and fifty years, those of Warren Hastings and Lord Melville, and none since 1805. From 1459 till 1621, a period of 162 years, there is no instance of an impeachment, and of the fifty-four impeachments between 1621 and 1805, no fewer than nineteen took place in the first three years of the Long Parliament. The disuse of the remedy of impeachment between 1459 and 1621 was due to the greatly increased judicial power of the Privy Council and to the enormous augmentation to the power of the Crown during the Tudor period. The power of impeachment as an effective remedy in its modern history was at its height in the seventeenth century, and particularly in the reign of Charles I. Impeachment was the weapon by which the Parliament fought their battle from 1640 till 1642. In the eighteenth century its importance declined, and it became a subject rather of constitutional and antiquarian interest than of practical importance. "As soon," writes Sir William Anson, "as the House of Commons became able so to control and review the conduct of ministers as to make it impossible for them to conduct business without a Parliamentary majority, impeachment lost its value and fell into disuse (Law and Custom of the Constitution, i., Parliament, p. 363). Sir Fitzjames Stephen thinks that it is hardly probable that "so cumbrous and unsatisfactory a mode of procedure" will ever be resorted to again. "The full establishment of popular government," he writes, "and the close superintendence and immediate control exercised over all public officers whatever by Parliament make it not only unlikely that the sort of crimes for which men used to be impeached should be committed, but extremely difficult to commit them." (History of the Criminal Law of England, i., p. 160).

LIABILITY OF HUSBAND FOR WIFE'S TORTS. — The Husband and Wife (Torts) Bill has been introduced by Mr. Newton to relieve married men from the liability now attaching to them to be sued in respect to torts or civil wrongs committed by their wives without being authorized by them and without any participation on their part. Such liability may be exemplified in matters of slander or libel, assault, trespass, malicious prosecution, and so on. It is proposed, in general, that a married woman should be liable as single women are. The Married Women's Property Acts enable a married woman to be sued, and damages or costs recovered against her in any action could be claimed against her separate property and not otherwise. It has been held that this statutory liability does not free the husband from his common-law liability. By the common law the husband was liable, and the wife was not liable, for her torts committed after marriage, and he was further liable, as well as she was, for those committed before marriage to the extent of the property received with her. The bill deals with this position very shortly, for it has but three operative clauses, one of which merely excludes Scotland from its purview, and it provides that a husband shall not, by reason only of his being a husband, be liable to any action in respect to his wife's tort, but the bill does not affect the liability for any tort committed by her while acting within the scope of any authority intrusted to her by him or for any tort participated in by him. A married woman is to be liable for torts as if a *feme sole*, and section 1 (2) of the Married Women's Property Act 1882, as to damages or costs being payable out of her separate property and not otherwise, shall not apply to actions and proceedings in tort. This bill, if passed, will get over the decision in Earle *v.* Kingscote (83 L. T. Rep. 377, [1900] 2 Ch. 585), where the Court of Appeal (Lord Alverstone and Lords Justices Rigby and Collins) decided that the acts affecting married women had not abolished the common law liability, and a husband was held liable in damages for a fraudulent representation made by his wife in respect to some shares, the contract being effected prior

to and independently of the fraud, and the fraud not being the means of effecting the contract. Lord Justice Rigby confessed to grave misgivings as to the meaning of the Married Women's Property Act 1882, and found it impossible to arrive at any clear conclusions.

RIGHT TO TAX PERSON LIVING ON VESSEL.—The recent case of Brown *v.* Burt decides a somewhat curious point of revenue law. An American citizen lived on board a yacht anchored in an Essex port. The residence seems to have been a complete one, for it included feeding as well as sleeping on board. While flying a foreign flag, the yacht seems to have been on no register, though at one time she had been upon the British register. This course of events seems to have gone on for a period of twenty years. In many respects the arrangement was economical, for the owner had paid neither rates nor taxes nor harbor dues, although the yacht had remained anchored within a quarter of a mile from the shore within the boundaries of a local authority. The Income Tax Commissioners demanded a return of income tax, and, receiving none, estimated it at £10,000, and the appellant appealed on the ground of foreign nationality, and further urged that the sole source of income was by way of remittance from abroad paid to a London bank. The argument also raised the point that the appellant did not reside in the United Kingdom, and that the yacht never left tidal waters. Mr. Justice Hamilton and the Court of Appeal have, however, concurred in finding that there was such a residence, and that the appellant was liable to income tax. "Residence" is a criterion of some difficulty, for it is a word having various meanings under various circumstances. In Cesena Sulphur Company *v.* Nicholson (35 L. T. Rep. 275, 1 Ex. Div. 428) it was laid down that it was where a person slept and lived, and domicil has nothing to do with it. This point is material in regard to the case recently decided, for the yacht had been used for a long period as a permanent spot for sleeping and living. The provisions as regards absenteeism and temporary residence mark a distinction between the mobile and immobile resident. Inland Revenue *v.* Cadwalader (5 Tax Cas. 101) illustrates another American case where a foreign barrister took a shooting lodge in Scotland for three years and resided in it for two months each year and was regarded as a person residing in the United Kingdom. On the other hand, a person who is always abroad during the year of assessment, though a portion of his family occupy his house here, may not be a resident in the United Kingdom (*vide* Turnbull *v.* Inland Revenue, 4 Sc. L. Rep. 15). The test of liability is not so much the residence as the residing, and this must amount to something like regular sleeping and living in the residence.

Obiter Dicta.

IT MIGHT HAVE BEEN EXPECTED.—In Cottrell *v.* Fountain, (N. J.) 77 Atl. Rep. 465, an action for assault and battery, the plaintiff sued for damages because he had been soaked with water by the defendant, Asbury Fountain.

EVEN VIOLENCE COULDN'T MOVE THEM.—"Notwithstanding the earnest, almost violent, argument of learned counsel, we adhere to our former opinion," etc. *Per* Root, J., in Hall *v.* Baker Furniture Co., 86 Neb. 389.

HOW THEY SETTLE THE LAW IN INDIANA.—"It is settled law that securities held by a surety for the payment of a debt are held by him for the payment of the debt." *Per* Olds, C. J., in Huffmond *v.* Bence, 128 Ind. 136.

UNNECESSARY HOMICIDE.—In Texas, a man who kills his wife by shooting her three times with a double-barreled shotgun is guilty of "a cruel and very unnecessary homicide." See Fletcher *v.* State, 138 S. W. 109.

THE RACE IS TO THE SWIFT.—The familiar Old Testament declaration (Ecclesiastes ix. 11) that "the race is not to the swift" meets with flat contradiction in the case of Strode *v.* Swim, 1 A. K. Marsh. (Ky.) 366. Strode won.

A NEW SUBJECT OF EXPERT DISAGREEMENT.—"Eminent lawyers have been called by both parties to testify as experts. But no two of them agree in their definition of privies." *Per* Rugg, J., in Old Dominion Copper Mining, etc., Co. *v.* Bigelow, (Mass.) 89 N. E. Rep. 217.

UNITED STATES AS PART OF NEW YORK.—In Wertheim *v.* Chicoutimi Pulp Co., [1911] A. C. at page 316, Lord Atkinson of the House of Lords observes: "On the authority of the three cases cited from the reports of the State of New York, namely, Grand Tower Co. *v.* Phillips, 90 U. S. 471," etc. Thus does the Empire State gain distinction abroad as well as at home.

CONFUSION!—In Oyster *v.* Oyster, 32 Mo. App. 270, it was held that an ouster of an Oyster who was the head of a family included an ouster of all the other Oysters in the family, and that if, after the Oysters had been ousted, any one of the ousted Oysters sowed crops on the land, such crops might be replevined from the ousted Oyster by the person who ousted the Oysters, and—well, what's the use?

ONOMASTIC REMARKS.—Some strange names of litigants appear in the federal reports of cases coming from the Philippine Islands. In 31 S. Ct. 423 we find "Go-Tiongco," and in 205 U. S. 403, "Go Tauco." We were about to suggest respectfully to our little brown brothers to whom we gave the Philippine Bill of Rights from our own revered Constitution that they keep Mr. "Go-Tohell" from shocking us in print, when it occurred to us that they might easily retaliate by introducing us to Mr. "Moose Dung" in 175 U. S., p. 3.

A MODEST WITNESS.—The lawyer had a somewhat difficult witness, says a writer in the Milwaukee *Journal,* and finally asked if he was acquainted with any of the men on the jury.

"Yes, sir," replied the witness, "more than half of them."

"Are you willing to swear that you know more than half of them?" demanded the lawyer.

"Why, if it comes to that, I'm willing to swear that I know more than all of them put together."

AMENITIES OF THE PROFESSION.—In Simmons *v.* Liberal Opinion Limited [1911] 1 K. B. 966, it appears that in an action for libel one A. E. Dunn, a solicitor, entered an appearance for "Liberal Opinion Limited." The plaintiff's solicitors wrote to Mr. Dunn saying that they had made an exhaustive search of the records and could not find that there was any such company as Liberal Opinion Limited, and would he inform them whether his client was a company, partnership, or individual. Dunn's answer, which is described by Cozens-Hardy, M. R., as "impertinent and improper," was as follows: "We beg to acknowledge the receipt of your letter of the 14th instant, and while congratulating you on the extended range of your research may we be permitted to suggest a continuance of the same as the best means of solving the problem submitted in your letter."

TEMPTATION THAT ENDURETH.—Joseph Amos Washington Bruen, an old negro, was recently sentenced in the Court of General Sessions in New York city to serve eight years in Sing Sing Prison for stealing chickens. Before Judge Foster he made a strong plea in his own behalf, saying that whenever he saw a chicken coop he could not resist the temptation to take a pullet or two. His record bears him out in this statement, as

he has been convicted three times for similar offenses. When he was asked if he had anything to say, Bruen said:

"'Deed, yo' Honah, I can't say much; mah record am sure against me. I hab served moh than sixteen years in prison foh de same offense. All I have to say, an' I hope yo' Honah will not be too stern, is dat I just simply can't keep away from a chicken coop nohow when I heah dem pullets acallin'!"

A MERCENARY LADY.—The following *bona fide* antenuptial agreement, as printed in volume 35 of the Indiana Appellate Court Reports at page 531, is remarkable not only from a grammatical and orthographic point of view, but also on account of its revelations of the mercenary character of the party of the second part. It will be noticed that when she comes to record her agreement she throws in two horses and a buggy for good measure: "I Rouland Vansell of the First Part, dose heare By agree to deed and convey 95 acres of land; and all of my household goodes the lande Being in Vigo Co Ind Nevins township descritpion N E Parte of the South E quarter of se too township thirteen north range eight west Being ninety-five acares to Maggie Mulvihill porviding that She Maggie Will Marry Me Rouland Vansell on the 23 day of Nov 1890. I Maggie Mulvihill of the Second Parte agrees to marry Rouland Vansell providing thate the Rouland Vansell does signe over the land and household goodes and two horses; and one Buggy too Me Maggie Mulvihill. I here set too my hand and selle."

A FUNERAL ORATION.—The majority opinion in Hack *v.* State, 141 Wis. 346, is declared by Judge Timlin (*dubitans*) to overrule certain early and long-accepted Wisconsin decisions. In masterly style the dissenting judge proceeds thus to eulogize and bemoan the fate of these overruled precedents: "Now it may be that these precedents deserved this fate. They perhaps deserved death in order that we all might live. They were certainly guilty of being old. They were not innocent of having been born at the wrong time. They perhaps distracted the circuit judges in the consideration of fine scholastic distinctions concerning lack of ordinary care by intruding upon them some rude, practical experience in the exercise of ordinary care. Like primeval man before his fall, unconscious of sin, they neglected to cover themselves with foliage. They obtruded their classic clearness and simplicity against the turgid top-loftiness which closed the nineteenth and began the twentieth century. They failed to stand for any corporate privilege or advantage. For all this they perhaps deserved amortization. But before Oblivion's curtain falls upon them forever, let me say that in my youth, before professional success and competence and a seat on the supreme bench had their value impaired by realization, and while such things were bright with the glamour of anticipation, these precedents seemed to me profound in their wisdom, unimpeachable in their authority, and clear, definite, and correct in their doctrine. Mentors of my bright days, farewell!"

THE LOVE LETTER OF A FOOLISH OLD MAN.—Truth is not only stranger than fiction, but it is often more amusing. The following love letter is taken, not from a modern trashy novel, but from the report of an actual criminal trial in Kentucky. The defendant, an elderly married man, was prosecuted under the statute against obscenity for sending the letter to an unmarried woman. A conviction in the trial court was reversed on appeal, the higher court remarking: "This letter is vulgar but not obscene, foolish but not lewd, ridiculous but not indecent, amusing but not disguisting." As to the accuracy of this statement, our readers may decide for themselves.

"My dearley beloved sweet little friend I. avail. my. self of this optunity of writing to you To let you no that you hav. a friend that Loves you most Dearley. Sence the day i first Met you at the corner of The School house in which you teach. yess. I believe I can say, and tell the Truth from the hart That you have not been often my mind one hour at a time except when I was buisy engaged are a sleep. as you steped from Behind some other girl To extend to me the hand of acquents you seamed Like a engel Let down From heaven. O, those Sweet eyes Like bright Morning stars seamed To speak in thunder tones I am to bee your next Loving Deare. . . . For true Love is stronger Then Death and sharper Then a. two edge. Soard and Covers a Multotude of faults i honstly believe thare is a great change i will bee left a lone in less Than 2 years For Trudy [the writer's wife] is in failing health She is bording on the Bright Deseas The Landrum wiming are verry short lived People and are verry Much subjeck to Prorales." (See 134 Ky. 578.)

Correspondence.

"INTELLIGENT LEGISLATION."

To the Editor of LAW NOTES.

SIR: In your columns of the LAW NOTES for September, 1911, I have noticed a paragraph headed "Intelligent Legislation," reading as follows: "As a companion piece to the bill said to have been introduced in the New York legislature, providing that when two trains approach a crossing together both must stop and neither must start again until the other has passed, our attention has been called to section 9 of an act of the legislature of Florida of June 1, 1907, and found on page 232 of the laws of the regular session of 1907, reading as follows: 'Section 9. This act shall take effect immediately upon becoming a law.'"

In justice to the wisdom of the Florida Solons we feel that you should correct this; and perhaps a proper heading for your correction would be "Intelligent Criticism." This letter is merely for the purpose of showing that a perusal of the Constitution of the State under which the legislators must act would make this section not only not unintelligent, but a masterpiece of English.

Section 28 of article 3 of the Constitution of the State provides when an act shall become a law. Section 18 of article 3 provides when a law shall take effect. Formerly it was the custom to have the section corresponding to section 9 of the

act under discussion read, "This act shall take effect immediately upon its passage and approval by the governor." This was unsatisfactory because it failed to provide for the time of taking effect of an act when it became a law without the governor's approval. Later the section corresponding to section 9 was made to read in various acts, "This act shall take effect immediately upon its passage and approval by the governor, or upon becoming a law without his approval." Some legislator who was evidently master of the principles of direct speaking and of brevity of expression evolved the language to which you take exception.

Do you not think you owe that man an apology?

J. M. Carson.

Jacksonville, Fla.

[We do, and it is hereby tendered. — Editor Law Notes.]

The Chimpanzee Case in the Oregon Courts.

To the Editor of Law Notes.

Sir: One of the most unique, and so far as I have been able to find, the only case of its kind that was ever instituted, was brought about a year ago in the Circuit Court of Multnomah county, State of Oregon, against the Northern Pacific Railway Company for $200,000 damages for wrongfully killing a highly trained Chimpanzee, which its owner was exhibiting, and had large contracts to exhibit in various theatres of the United States. It appears from the complaint that Charles Judge, the plaintiff, had a contract with Sullivan & Considine to exhibit said animal at the rate of $750 per week. That Sullivan & Considine are operating a large number of vaudeville houses and theatres on the Pacific coast, and that, according to the joint tariff of the Northern Pacific Railway Company, any theatrical company holding twenty-five fully paid-up adult passenger tickets is entitled to the use of a special baggage car for the transportation of the baggage and theatrical paraphernalia of its artists, and that plaintiff was one of the persons for whose benefit such tickets were bought. That some time in May, 1910, at the time plaintiff wanted to leave Seattle, Wash., said special baggage car was not in a suitable condition to convey said animal, and consequently arrangements were made between the plaintiff and the railroad company to ship the animal in the general baggage car. At the time the animal was delivered to the baggage master express instructions were given to him not to turn on or cause or permit to be turned on the steam in the radiator while the animal was contained therein. It appears that plaintiff was not to pay, and did not pay, to the railroad company any additional charge for the concession of having the animal transported in the general baggage car. Defendant placed the cage which contained the animal directly next to the radiator, and then in wilful violation of the instructions of the shipper, turned on and caused and permitted to be turned on, the steam into said radiator, which caused said animal to die of suffocation.

Defendant in its answer pleads as a defense that, according to the duly published tariffs, said animal could only have been transported in the special baggage car, and when it was transported in the general baggage car without compensation, that plaintiff and defendant violated the Interstate Commerce Act, by unjustly discriminating in favor of the shipper and giving him a rate less than the regular rate established by such tariff. To this defense plaintiff demurred, and Judge Bean of the federal court sustained said demurrer.

It can readily be seen that some of the nicest questions of law are involved in this case, and the same promises to be the leading case on the points involved. In the duly published tariff defendant expressly disclaims to be a common carrier of live animals or gas tanks, and generally takes a release, if such property is shipped, releasing the railroad company from all claims for damages for negligence. If the Northern Pacific Railroad Company received such animal as a common carrier, then the question arises whether the arrangement entered into between plaintiff and defendant, whereby the animal was shipped in the general baggage car, only amounted to a substitution of cars, and therefore justifiable, or whether such

arrangements would constitute a violation of that section of the Interstate Commerce Act which prohibits undue and unreasonable discrimination in favor or against any shipper. Was the fact that the special baggage car was not in a suitable condition, such a dissimilarity of circumstances as to justify the arrangements entered into?

On the other hand, it can be claimed that the Interstate Commerce Act has no application to the case at all, because defendant in its published tariffs expressly disclaims to be a common carrier of live animals and gas tanks, and consequently defendant received the animal only as a private carrier. Attorney for plaintiff, when drafting the complaint, evidently seems to have had in view this theory of the case, backed by the case of Honeyman *v.* Oregon California Railroad Company, 13 Ore. 352, and charging defendant to be a common and private carrier in his complaint. The cases reported in 129 Fed. 774 and 66 Fed. 506 seem to settle the point beyond the question of a doubt, that a carrier is not a common carrier of that kind of property, but only a private carrier, and consequently has the right to enter into any such contracts of shipment, and on such terms and conditions as he deems fit.

If the defendant received the animal only as a private carrier, then it seems that the question of negligence is entirely out of the case, because it is simply a case of bailment, and the instructions of the bailor having been violated, the property having been destroyed, the bailee cannot avoid liability.

But defendant claims that the release which it is in the habit of taking, and which under the tariff it was bound to take, should be read into the contract as being part thereof, when no such release was actually signed nor accepted or assented to by the shipper. It seems that this contention is untenable, because the law seems to be clearly settled that unless a release is actually taken a railroad company cannot gain any advantage by relying upon its habit, or usage, or custom of taking such releases; in other cases (6 Cyc. 408, and cases cited).

If the shipper gave instructions to the railroad company not to turn on, or cause or permit to be turned on, the steam into the radiator, would it make any difference if the shipper himself loaded the animal, and himself placed the cage which contained the animal against the radiator? Would the last clear chance doctrine, laid down by the case of Davis *v.* Mann, the famous donkey case, not apply? Had the plaintiff not the right to rely upon defendant following his instructions with reference to the steam, and can it be said that if plaintiff did place said animal against the radiator that he acted negligently in doing so? Is the law not well settled on the point, that where a carrier violates the instructions of a shipper that he does so at his risk and becomes an insurer?

The foregoing are but a few of the interesting propositions and questions of law involved in the case. The question of the authority of railroad officials to make special contracts of shipment; authority of baggage masters to receive property which the railroad company is not in the habit of carrying; the question whether plaintiff can recover only the reasonable value of an ordinary chimpanzee, or whether he is entitled to recover the value of this particularly highly trained chimpanzee, and what such value is; the question whether plaintiff is entitled to recover for any loss which he has suffered on account of big profits from carrying out contracts amounting to $75,000 or more; the question whether the life expectancy of such animal can be taken into consideration in measuring the damages, are some further interesting points in the case.

The case has been watched with considerable interest by a good many of the local attorneys, and particularly the attorneys for the railroad company, and although at first the opinion as to liability seemed to be divided since the decision of the federal court, sustaining the demurrer to the Interstate Commerce Act, the opinion of nearly all the leading attorneys seems to be to the effect that there is no question about liability on the part of the railroad company.

Under the laws of the State of Oregon, in case of death of a human being, the limit of recovery is fixed at $7,500. An anomalous case may arise that the life of this chimpanzee, which, according to Darwin's theory constitutes only the missing link, might be fixed by the jury to be worth $200,000. From newspaper reports, and from talking with people who have seen the animal perform, there seems to be no question but that it was absolutely the best trained animal that was ever shown at any time on the stage, and was a big drawing card for the theatres. Some of the many things the animal could do was to ride a bicycle between nine-pins, taking the curves and measuring and judging distances with an ease that was simply surprising and baffling; walking upright, not only on the stage, but also on the streets, dressed up like a man, smoking a cigar or cigarette with the careless nonchalant manner of a college garduate; eating with knife and fork, and drinking not only soft, but also intoxicating beverages like one of the upper ten-thousand at some of the fashionable and much frequented roof gardens at New York, and various other stunts and tricks. Will some light of the legal profession take it upon himself to foretell the outcome of this case, or venture to engage upon a little discussion of the subject? It strikes me to be not only one of the most unique, but also one of the most complicated and difficult cases of its kind that was ever brought. It certainly ought to be a good subject for the ambitious and zealous practitioners of some mute or practice court of some of the law departments of our universities.

W. E. FARRELL.

PORTLAND, OREGON.

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Sauce for the Goose, Sauce for the Gander.

IN this country there are about 125 federal judges, and until last year any one of them, if he were sitting in the United States Circuit Court, had the power to declare a State statute invalid as an infringement of the Federal Constitution, and thereupon to grant an interlocutory injunction restraining the State authorities from taking any steps to enforce the statute. It is a wonder that the people submitted for so long a period to the exercise of this one-man power by a judge whose tenure in office was not in the slightest degree dependent upon his knowledge of constitutional law or even of general federal jurisprudence. By section 17 of the Act of June 18, 1910, c. 309, 36 St. L. 539, 557, creating the Commerce Court and amending the act to regulate commerce, it was provided "that no interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer in such State in the enforcement or execution of such statute shall be issued or granted by any justice of the Supreme Court, or by any Circuit Court of the United States or by any judge thereof, or by any district judge acting as circuit judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit judge, or to a district judge acting as circuit judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court of the United States or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application." The rest of the section provides for the practice to be pursued upon such application. Doubtless the evil at which the statute was principally directed was the *granting* of injunctions by a single judge, and not the *denying* of injunctions. That must have been the theory of the federal district judge in Kansas who, sitting alone, held the State statute constitutional, and denied an application for injunction. Thereupon the plaintiff obtained a peremptory mandamus from the United States Supreme Court commanding the judge to call to his assistance two other judges and hear and determine the application. It was the unanimous opinion of the Supreme Court, speaking by Chief Justice White, that "the statute evidences the purpose of Congress that the application for the interlocutory injunction should be heard before the enlarged court, whether the claim of unconstitutionality be or be not meritorious;" for the reason, which seems conclusive to our mind, that "the appeal allowed to this court [by the act] is from an order denying as well as from an order granting an injunction." *Ex p. Metropolitan Water Co.*, 220 U. S. 539, 31 S. Ct. 600, decided May 15, 1911.

Alleged Reason for So Many Murders in Georgia.

IN *U. S.* v. *Gibson,* 188 Fed. 397, an application for supersedeas after conviction for burglary of a post office, Judge Speer of Georgia incidentally referred to a section of the Georgia Code as a fruitful cause of delay in the administration of criminal justice in Georgia, and then remarked: "That and perhaps the provision known as the 'dumb act' which prevents the court from stating what has been proven, even though it may not be in the slightest dispute, from intimating an opinion as to the facts, whether they are in dispute or not, are perhaps of all others the most fruitful reasons why the condition of our State is so lamentable in so far as the criminal laws are involved, and perhaps explains why every year there are many more murders in the State of Georgia with its less than 3,000,000 population, than there are in Great Britain and Ireland with more than 45,000,000 population." So far as Judge Speer attempts to make the "dumb act" responsible for the prevalence of unpunished murders in Georgia we disagree with him. Volume 135 of the Georgia reports shows that from August, 1910, to March, 1911, six or seven months, the Supreme Court affirmed twenty-two convictions for murder and *reversed eleven convictions.* We can discern no relation whatever between this big percentage of reversals and the Georgia "dumb act." Moreover, it was less than a year ago, if we are not mistaken, that Judge Speer begged a federal grand jury of Georgia citizens to bring in an indictment against some men accused of maltreating negroes, and upon their refusal to do so he was unable to restrain his tears. If the accused men ought really to have been indicted and punished, surely the State "dumb act," which could not and did not deter the federal judge, was not to blame for the failure of justice.

The Georgia "Dumb Act."

THE statute which Judge Speer termed the "dumb act" is section 1058 of the Georgia Code of 1911, which provides as follows: "It is error for the judge of the Superior Court, in any case, during its progress, or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved, or as to the guilt of the

accused; and a violation of the provisions of this section shall be held by the Supreme Court to be error, and the decision in such case reversed, and a new trial granted, with such directions as the Supreme Court may lawfully give." From the marginal note to the section we infer that the provision was originally enacted in 1850. Similar statutes have existed for a long time in many States. It is pretty certain that the legislators distrusted the ability of the judges to give sterling advice to juries in the matter of determining questions of fact. "Juries take a common-sense view of every question, according to peculiar circumstances, whereas a judge generalizes and reduces everything to an artificial system formed by study," was the testimony of Judge Pearson of North Carolina in *State* v. *Williams,* 2 Jones L. (47 N. C.) 257, 269. The writer of an article in LAW NOTES a few years ago said that the intellectual degradation to which a judge may be brought by parrot-like repetition of ill-considered judicial statements concerning positive and negative testimony, for example, may equal the moral prostration of some minds under the malign influence of shocking religious superstitions, and may be as dangerous to the life or liberty of innocent persons. "If any one doubts it," he continued, "we invite him to read the charge of the trial judge to the jury as reported in *Innis* v. *State,* 42 Ga. 473, where the jury, relying on the judge's instruction, convicted the defendant of a capital offense, but the conviction was set aside by the Supreme Court." Even a Lord Bacon, "the Columbus of thought," on the bench, might well remain dumb in the presence of a William Shakespeare, "the Stratford peasant," on the jury, when the value of human testimony was to be estimated.

Nevertheless we concur with President Taft, Judge Speer, and numerous other jurists in the opinion that a judge ought to have the liberty, as at common law, to give to a jury the benefit of his observations and reflections in the determination of questions of fact. The jury will not necessarily echo the sentiments of the judge. With impressiveness surpassing any similar instruction that we have ever read, Judge Betts expounded to a jury in *U. S.* v. *Osgood,* Fed. Cas. No. 15,971*a,* the maxim *falsus in uno, falsus in omnibus,* as applied to the principal witness for the government. But the report concludes: "The jury found the prisoner guilty upon the whole indictment."

Progressiveness on the Federal Bench.

IN the report of the "special committee to suggest remedies and formulate proposed laws to prevent delay and unnecessary cost in litigation," which was presented at the meeting of the American Bar Association at Boston, in August, a bouquet was handed to Judge Amidon for his doughty progressiveness in a case before him in the federal Circuit Court. "It was for many years the practice in the federal courts to dismiss a suit which was held to have been brought on the wrong side of the court, and compel the plaintiff to resort to another action," says the committee's report. "But in the recent case of *Schurmeyer* v. *Conn. Mut. L. Ins. Co.,* 171 Fed. 1, 96 C. C. A. 107, a more liberal practice was adopted. Plaintiff sought relief in an action at law which could only be granted in a suit in equity. This was finally decided by the Circuit Court of Appeals, and the case remanded to the Circuit Court. Judge Amidon in the Circuit Court made an order directing the plaintiff to transform his complaint at law into a bill in equity, and directed that the cause be transferred to the equity docket, there to be proceeded with the same as if it had been originally brought as a suit in equity. The Circuit Court of Appeals approved this practice." But we do not think a federal appellate court consisting entirely of judges possessed of Judge Amidon's spirit would dare to apply a remedy for such a serious evil as is exemplified in *Kerr* v. *U. S.,* 159 Fed. Rep. 428, 86 C. C. A. 408; *Price* v. *U. S.,* 169 Fed. Rep. 791, 95 C. C. A. 257, and a multitude of similar cases. In the case first cited it was held that where a judgment is erroneously sought to be reviewed on appeal instead of a writ of error, "the objection cannot be waived by appearance nor be cured by amendment," and the appeal must be dismissed. In the other case cited, where the same mistake in appellate procedure had been made, the appeal was also dismissed, although the record contained all of the essential elements of a writ of error. In all such cases, if the time for suing out a writ of error has expired, the error in procedure leaves the complaining party remediless. Surely the administration of justice in the federal courts is not a model contrivance.

Another Judicial Progressive.

BUT it seems to us that precedence for intrepidity will have to be awarded to Judge Denison, sitting in the federal Circuit Court for Michigan, if he adheres to his novel ruling in *U. S.* v. *Harsha,* 188 Fed. Rep. 759, after the parties decline to submit to it. It was an action at law by the government against a former clerk of the Circuit Court and the surety on his bond for the balance due on an account, covering and involving the conduct of his office for twenty-seven years and his taxation of his own costs in about 2,200 cases. There were more than 40,000 items, each open to contest; a skilled examiner, with from two to five assistants, worked industriously for more than six months to make up and state the account, which was the basis of the action. Judge Denison estimated that a trial would consume as much as four months. *The case stood for a jury trial, "now comes up for trial and is regularly reached."* Verily, a colossal situation. "Under these circumstances, should I impanel a jury and proceed with the trial?" queried the judge. "I think not. The case is the typical, the ideal one for a master in chancery, and is so unsuitable, indeed so unfit, to be tried by jury, that such a trial, unless the issues were simplified, would be a mere farce. I think all the proceedings herein should be stayed pending a resort to equity by some one or more of the parties. If no one of them should do so, that would raise another question." Yes, a formidable constitutional question. Meanwhile, he entered "a formal order refusing to proceed with the trial, and if I am mistaken in entering such order, the question can be quickly raised and disposed of by mandamus proceedings." If application for mandamus is made, we are afraid the judge's record as a reformer will be hard hit.

Phenomena Caused by Change in State Constitution.

NEW and interesting phenomena are incessantly arising out of the relation between state and federal law and practice. Congress has provided that jurors in federal courts in each State shall have the same qualifications and be entitled to the same exemptions as jurors in

the highest court of law in the State. Federal jurors are drawn from a box containing not less than three hundred names selected by the federal court clerk and a resident citizen commissioner who is "a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong." So that litigants in a federal court before a jury will have their controversy determined by substantially the very same men who would be found on the jury if the case were being prosecuted in the State court. Now, actions for damages for personal injuries, especially against railroad companies or other corporations, constitute one of the largest classes of cases brought into courts. But it happens that federal doctrines are, in some particulars not necessary to mention here, more favorable to plaintiffs in that class of cases than the doctrines in some of the State courts. Besides, the personal attitude of a federal judge in this or that particular district may be a factor inuring to the benefit of the plaintiffs. Therefore, a lawyer in an Atlantic coast State might be at a loss to understand why plaintiffs in Oregon are strenuous to have their personal injury cases brought and kept in the State court. But the explanation is a simple one. In 1910 a constitutional amendment was adopted in Oregon which provides that "in civil cases three-fourths of the jury may render a verdict." As a direct consequence, "the temptation to join in personal injury actions a local defendant with a nonresident to prevent the removal of the cause to this court is so great," etc., said Judge Bean in *Shaver* v. *Pacific Coast Condensed Milk Co.,* 185 Fed. Rep. 316, where a motion to remand was overruled. Requirement of a unanimous verdict in civil cases has been abolished in several States and provision for a verdict by three-fourths is quite likely to be adopted in many others. Nothing but an amendment of the United States Constitution can dispense with unanimity in federal courts. Hence we expect to see Congress importuned to abridge more and more the right of removal of cases from State to federal courts, and especially to forbid such removal by corporation defendants whose foreign citizenship is essentially unreal. A marked precedent for such restrictive legislation is the amendment of April 5, 1910, to the railroad employers' liability act, providing that "no case arising under this act" — foreign corporations not excepted — "and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

Summary Conviction and Punishment for Perjury.

IN an article under this caption in LAW NOTES for last June we suggested that if judges would more frequently proceed to punish perjury in their courts as criminal contempts, without resorting to trial by a jury, it might soon cease to be a popular crime, and we cited a few bankruptcy cases in the federal courts where judges had convicted parties of perjury and sentenced them to imprisonment. In our August number appeared a letter from the attorney-general of Porto Rico, stating that the legislative assembly of that island enacted at its last session a statute providing for summary proceedings in perjury cases. Of federal cases other than those in bankruptcy, *Motion Picture Patents Co.* v. *Yankee Film Co.,* (June, 1911) 188 Fed. 338, in the Southern District of New York, is the first that we have observed where it was proposed to treat perjury as a contempt. That was a patent infringement suit, and on a motion to punish defendants for contempt in delaying the delivery of cameras to be impounded, Judge Lacombe said:

"The defendants, or some of them, on the motion for injunction, undoubtedly gave testimony calculated to give the court the impression that, as to two designated cameras, they could not state positively what was the internal construction, because such cameras were operated by their owners, who refused to allow defendants to see the interior of the box containing them. It is now admitted as to one of them that the operator was not the owner, but that defendants had obtained it from an outside party, and apparently had every opportunity to see how it was constructed. . . . This man has now testified, and, if he is to be believed, the court was imposed upon. It may be that we have here a case of contempt, not by the disobedience of an order, but by misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice. U. S. R. S., § 725, 4 Fed. Stat. Annot. 534."

For the purpose of orderly procedure the plaintiff was instructed to lay all the facts before the United States attorney for the district, "who will," said the court, "if a *prima facie* case is made out, institute proceedings on the criminal side of the court for such alleged contempt."

Near Impeccability of Judges.

PRESIDENT TAFT lately declared in a public speech that he had known federal judges who ought to have been impeached but who managed to prevent the bringing in of a bill of impeachment. October 10 an overwhelming majority of California electors voted into the State constitution a provision for the recall of judges. Other States have done or are seeking to do likewise. But opinions upon the nature of judges in general are not entirely harmonious. *Patterson* v. *Colorado,* 206 U. S. 454, 27 S. Ct. 556, was a case where the Colorado Supreme Court had convicted an editor for contempt in publishing an article and a cartoon reflecting upon the motives and conduct of the members of the court in a case then pending before them, and the defendant objected that the judges were sitting in their own case. Mr. Justice Holmes of the United States Supreme Court took occasion to remark that while publications attacking jurors might affect their judgment, "judges generally perhaps are less apprehensive that publications impugning their own reasoning or motives will interfere with their administration of justice;" implying that judges are made of a superior quality of clay. (But in *City of Detroit* v. *Detroit City R. Co.,* 54 Fed. Rep. 1, 19, 20, Judge Taft said "we must presume a human weakness" in the judges of State courts.) Furthermore, continued Mr. Justice Holmes, "the grounds upon which contempts are punished are impersonal," and "no doubt judges naturally would be slower to punish when the contempt carried with it a personal dishonoring charge." Thus in *U. S.* v. *Gehr,* 116 Fed. 520, a labor agitator had delivered a public speech wherein he applied villanous epithets to a federal judge who had issued an injunction. The judge whom he thus reviled tried and convicted him for contempt, and sentenced him to imprisonment for three months. "Were I to-day dealing with this man for any other officer of this court, or for one of the judges of this court, instead of myself," said the judge, "I would unquestionably give him not less than a year in prison. He richly deserves it." How did this deliberate remission of nine months of merited punishment for the cul-

prit consist with the judge's duty to the public pursuant to his oath of office? Certainly the "impersonal" element of which Mr. Justice Holmes spoke was emphatically repelled by the judge. Several prominent men are now being prosecuted for criminal contempt before a judge whose judicial conduct they have fiercely assailed. We understand that he has refused the urgent request of eminent counsel that the case be heard by another judge of the same court who has no ground for personal resentment, and therefore, upon Mr. Justice Holmes's theory, no reason for leniency. These accused men, if they are guilty, ought to rejoice at the good fortune that has fallen into their lap.

By the way, it is provided by statute in many of the States that a judge shall not act in a case when it appears from affidavits properly made and substantiated that either party cannot have a fair trial before him by reason of the bias or prejudice of such judge. A provision of that character appears in section 21 of the Federal Judicial Code which goes into effect Jan. 1, 1912, but it applies only to the United States District Courts.

Profitable Mental Anguish Business.

LAWYERS looking around the country for an "opening" to do business on a contingent fee basis should inspect the index title "Telegraphs and Telephones" in the Pacific and Southwestern Reporters. Every volume will show him cases where the Supreme Courts have affirmed fat verdicts against the Western Union Telegraph Company for mental anguish caused by failure to deliver telegrams announcing the death or serious illness of a near relative of the persons addressed. Such sums as "$1,000" and "$2,000" appear with so much frequency on the printed page that the "ambulance chasers" of the manufacturing and populous eastern States will be tempted to migrate in considerable numbers. For instance — and it is only an instance — in *Western Union Tel. Co.* v. *Hartfield,* 138 S. W. Rep. 418, decided May 17 in the Texas Court of Civil Appeals, it appears that the following telegram failed to reach its destination in time to enable the addressee to attend the funeral of Bean, who was her beloved uncle. "Bean died this morning at 4.40 [Signed] Joe." The jury awarded $1,950 damages to the addressee, and judgment on the verdict was affirmed. Velvet money undoubtedly; no doctors' bills for plucking from the memory a rooted sorrow. In *Western Union Tel. Co.* v. *Crawford,* 116 Pac. Rep. 925, decided by the Oklahoma Supreme Court June 27, by a curious concatenation of circumstances the plaintiff, a woman, had suffered some physical injuries proximately attributable, in the opinion of the court, to the company's neglect faithfully to transmit a telegram to her, and judgment on the jury's verdict for $2,000 was affirmed. Incidentally we observe that an Oklahoma statute gives attorneys a lien on a judgment to the extent of a contingent fee "not to exceed fifty per centum," etc. Comp. Laws 1909, § 275.

We have noticed that in some of the mental anguish cases the plaintiff's complaint demanded $1,999 damages. LAW NOTES gives the fifty per centum brethren this bit of information, viz., a suit involving exactly $2,000 cannot be removed from a State court to a federal court. *Kaufman* v. *I. Rheinstrom Sons Co.*, 188 Fed. Rep. 544. Don't be afraid to make it an even $2,000, gentlemen.

Summoning Jurors by Mail.

IN LAW NOTES for March, 1910, we reprinted part of a circular letter which Hon. James E. Tolbert, district judge of the Seventeenth Judicial District of Oklahoma, had addressed to members of the legislature of that State recommending that an act be passed providing for the summoning of jurors by personal notice, notice over the telephone, by telegraph, or by mail, ordinary or registered, in the discretion of the judge of the court ordering the juries. "We think Judge Tolbert's recommendation . . . should receive serious consideration," is what we then said, expressing the opinion, however, that notice by mail "should be in all cases registered mail." The proposed innovation seems to have made no impression on the Oklahoma legislators. But they must plead guilty to the charge of excessive timidity, for section 279 of the new federal judicial code provides for the service of writs of venire by registered mail, and after next January Judge Tolbert will have the satisfaction of seeing them so served for the federal courts in his own State. In a note to the judicial code section the committee on revision says:

"The present system of what is known as personal service was established at a time when the postal facilities were inadequate and precarious. This is no longer the case. There is no more efficient or reliable agency in the service of the government than its post-office establishment. Upon application to the department we were supplied with statistical information which shows that only one registered letter in one thousand fails to reach the person addressed. This proportion is considerably reduced when account is taken of errors in the addresses and removals and deaths of addressees. The government intrusts matters of the highest importance to its mail, and makes it compulsory upon private citizens to act in the same confidence. There seems to be no reason why the service of venires, which requires only that the persons named shall be notified that their attendance is required at the time and place designated, should be an exception. The receipt of the person to whom the summons is addressed is made evidence of personal service. If it should occur that the summons did not reach such person, and the receipt was signed by another, upon the representation of those facts to the court they would unquestionably be accepted as an excuse for nonattendance. The saving of expense is the main consideration in support of this change. In districts of large area the mileage of field deputies when serving jurors amounts to a very considerable sum, and it would appear that this expense may wisely be saved."

If the federal legislation turns out to be a genuine improvement its general adoption in the several States is highly probable despite the opposition of officers whose mileage fees will be abolished by it.

Latest Reported Anti-trust Act Case.

IN *U. S.* v. *E. I. Du Pont De Nemours & Co.*, 188 Fed. Rep. 127, decided June 21, appears the first judicial appreciation of the rulings of the Supreme Court in the Standard Oil Co. and American Tobacco Co. cases. The suit was brought in the Circuit Court for the district of Delaware under the Sherman anti-trust act against forty-three corporate and individual defendants. The petition and answers filled a volume of over 500 pages, while the proofs filled a dozen volumes. The case was heard before Circuit Judges Gray, Buffington, and Lanning, the latter writing the opinion. In the end the entry of an interlocutory decree was directed. "It will adjudge that the twenty-eight defendants are maintaining a combination in restraint of interstate commerce in powder and other

explosives in violation of section 1 of the anti-trust act, that they have attempted to monopolize and have monopolized a part of such commerce in violation of section 2 of that act, that they shall be enjoined from continuing said combination, and that the combination shall be dissolved. The interlocutory decree will further adjudge that this court, in order to obtain such further information as shall enable it to frame a final decree which shall give effective force to its adjudication, will hear the petitioner and the defendants on the 16th day of October next as to the nature of the injunction which shall be granted herein and as to any plan for dissolving said combination which shall be submitted by the petitioner and the defendants, or any of them, to the end that this court may ascertain and determine upon a plan or method for such dissolution which will not deprive the defendants of the opportunity to re-create, out of the elements now composing said combination, a new condition which shall be honestly in harmony with and not repugnant to the law. The interlocutory decree will further adjudge that both parties shall have leave to take such additional proofs as they may deem proper to be used at the hearing aforesaid. It is not to be inferred, however, that this court will sanction or supervise any new condition that defendants may re-create, or perform any other act which shall be merely administrative in its nature. *Hayburn's Case,* 2 Dall. 409, 1 L. ed. 436; *United States* v. *Ferreira,* 13 How. 40, 14 L. ed. 42; *Gordon* v. *United States,* 117 U. S. 702."

In the course of the opinion it was said: "There is a distinction between restraint of competition and restraint of trade. The latter expression had, when the anti-trust act was passed, a definite legal signification. Not every combination in restraint of competition was, in a legal sense, in restraint of trade. Two men in the same town engaged in the same business as competitors may unite in a copartnership, and thereafter, as between themselves, substitute co-operation for competition. Their combination restrains competition, and if their town is located near the line between two States, and each has been trading in both States, their combination restrains competition in interstate trade. But it does not necessarily follow that such restraint of competition is a restraint of interstate trade and commerce. The determination of whether it be so must depend upon the facts and circumstances of each individual case. It is undoubtedly the policy of the statute that competitive conditions in interstate trade should be maintained wherever their abolition would tend to suppress or diminish such trade. But this being true does not read into the statute a denunciation of all agreements that may restrain competition without regard to their purpose or direct effect to restrain 'trade or commerce among the several States.' To what extent the anti-trust act condemns combinations that restrain full and free competition in interstate trade is a question that has been much debated. For a dozen years, at least, it has been settled that it does not condemn combinations which only indirectly, remotely, or incidentally restrain interstate trade."

The court then cites the Standard Oil Co. and American Tobacco Co. cases in the Supreme Court and says they "make it quite clear that the language of the anti-trust act is not to receive that literal construction which will impair rather than enhance freedom of interstate commerce. As we read those decisions, restraint of interstate trade and restraint of competition in interstate trade are not interchangeable expressions. There may be, under the anti-trust act, restraint of competition that does not amount to restraint of interstate trade, just as before the passage of the act there might have been restraint of competition that did not amount to a common-law restraint of trade. This fact was plainly recognized in *United States* v. *Joint Traffic Association,* 171 U. S. 505, 567, 19 S. Ct. 25, 31, 43 L. ed. 259. . . . The recent decisions of the Supreme Court make it equally clear that a combination cannot escape the condemnation of the anti-trust act merely by the form it assumes or by the dress it wears. It matters not whether the combination be 'in the form of a trust or otherwise,' whether it be in the form of a trade association or a corporation, if it arbitrarily uses its power to force weaker competitors out of business, or to coerce them into a sale to or union with the combination, it puts a restraint upon interstate commerce, and monopolizes or attempts to monopolize a part of that commerce, in a sense that violates the anti-trust act."

SOME LEGAL ASPECTS OF THE CANADIAN ELECTION.

THE progress and result of the recent reciprocity campaign in Canada strikingly illustrate the differences between the presidential system of representative government as it exists in the United States and the parliamentary cabinet system of Great Britain and her self-governing "dominions beyond the seas." The government at Ottawa, it is perhaps needless to say, is, putting the federal structure of the Dominion out of consideration, an almost exact copy of that at Westminster. These differences in their broad outlines are of course familiar to every American lawyer. In discussing the Canadian election with professional friends on this the southern side of the line, the writer has found some of them, however, desirous of information as to the details of the political machinery which when cranked up by the reciprocity agreement not only crushed, for a time at least, the hopes of the advocates of freer trade throughout the continent, but put the Liberals out and the Conservatives in, retired Sir Wilfrid Laurier from office, and made Mr. Borden practically the ruler of Canada. The present article is an attempt to answer some of the questions suggested by such discussions. The close student of the British parliamentary system will probably find in it but little, if anything, that is new to him.

The answer to the question why the fate of the reciprocity agreement could not have been decided in Canada on the floors of the House instead of by an "appeal to the people" is that the election was necessitated by a combination of three factors: the absence of any rule of procedure similar to the "closure" of the English Parliament or the "previous question" of Congress; the custom of appropriating money for one year only; and the constitutional principle that a leader who is unable to carry a vital measure through Parliament has the right to obtain an expression of public opinion upon the question before retiring from office. At the time of the introduction of the bill intended to carry the agreement into effect, Sir Wilfrid Laurier had a majority of about forty members. Had he been able to bring the bill to a vote, reciprocity

would probably be in force to-day. By continuing to debate the question Mr. Borden and his followers obstructed other measures and threatened to prevent indefinitely the voting of "supply," that is, the moneys needed for the public services for the approaching fiscal year. The opposition contended that as the question of reciprocity had not been an issue at the previous general election, it could not be presumed that it was supported by popular approval, and the opinion of the people should therefore be obtained by means of a general election. Laurier took the position that as both parties had been for many years advocates of reciprocity its submission to the people was unnecessary. These opposing contentions suggest some nice constitutional questions, which cannot, however, be discussed in the space at our disposal. The word "constitutional" is used, of course, in the English sense. "When an Englishman," says Mr. Freeman, in his *Growth of the English Constitution,* "speaks of the conduct of a public man being constitutional, he means something wholly different from what he means by conduct being legal or illegal." It will no doubt be argued in the future that the success which has attended Mr. Borden's tactics establishes their constitutionality.

In order to put an end to the debate, to expedite public business, and to carry out his understanding with Mr. Taft that each party to the agreement would use his utmost efforts to put it into effect, Sir Wilfrid Laurier availed himself of his constitutional right to advise the Governor-General to dissolve the House. "Where, as in the United States, no legislative assembly is a sovereign power, the right of dissolution may be dispensed with; the constitution provides security that no change of vital importance can be effected without an appeal to the people; and the change in the character of a legislative body by the re-election of the whole or of part thereof at stated periods makes it certain that in the long run the sentiment of the legislature will harmonize with the feeling of the public. Where Parliament is supreme, some further security for such harmony is necessary, and this security is given by the right of dissolution, which enables the Crown or the Ministry to appeal from the legislature to the nation." (Dicey's *Law and Convention of the Constitution,* p. 366.) The right to dissolve the House is one of the remaining prerogatives of the Crown; "a term," says Dicey, "which has caused more complexity to students than any other expression referring to the constitution. The 'prerogative' appears to be both historically and as a matter of actual fact nothing less than the residue of discretionary or arbitrary power which at any given time is legally left in the hands of the Crown."

The dissolution of the House transferred the contest from the floors of Parliament to the public platform. Although the voters cast their ballots for a man and not a measure, their election of certain men would be regarded as decisive of the question. We are thus brought to a consideration of some of the practices which distinguish a general election in Canada from a presidential contest in this country. Some few of these practices are explicitly provided for by statute; more, perhaps, have been established by the continued observance of unwritten laws in the historical development of cabinet government.

Although the duration of the Canadian House of Commons is limited to five years there is no fixed election date. Writs in the name of the Governor-General are issued to a returning officer in each district, commanding him to cause an election to be held and appointing a day for the nomination of candidates. The law provides that polling shall take place a week after nomination day. The latter date is decided upon by the Premier and his cabinet, and is the same date for all except a few very remote districts. Thus Canadian elections are one-day affairs as in this country, instead of stretching over several weeks as in Great Britain.

Any British subject other than a public servant, government contractor, or member of a provincial legislature, is eligible as a member of the House of Commons. Nominations are required to be made by the filing of a nomination paper with the returning officer, signed by twenty-five electors of the district and accompanied by the consent of the nominee. He is also required to make a deposit of two hundred dollars, to be returned to him in the event of his election or the receipt of at least one-half of the number of votes polled in favor of the candidate who is elected. This provision is designed to discourage irresponsible or joke candidates, and to lose one's deposit is equivalent to being distanced in a horse race. There are no statutes relating to the holding of primaries or party conventions. In fact, perhaps the only legal recognition of the party system to be found in either Great Britain or the colonies is the provision for the payment of the Leader of the Opposition in Canada. The convention system is followed, however, to some extent. Meetings of partisans in each subdivision of an electoral district appoint one or two of their number to represent them at a convention for the election of candidates, and with few exceptions the only names on the ballot are those of men selected at these party conventions. Since the only official to be elected is the member of the House for the district (some few districts are entitled to two members), there is nothing to correspond to the State or national party conventions or the State committee of this country. Governors, judges, sheriffs, senators, and all purely executive officers are appointed by the cabinet in the name of the Governor-General. The provincial governors, of course, like the Governor-General, are merely "constitutional" or nominal rulers. A governor who should attempt to advance or retard legislation or exercise his veto power would be acting unconstitutionally, except perhaps in some very unusual case.

One practice which the Canadian likes, but which every American that the writer has met looks upon as very curious, is the frequent choosing of candidates who do not live in the district. Under such a system rural communities are able to avail themselves, if necessary, of the talents of men of business or professional rank in the cities, and an able man with political aptitude who lives in a district which is unalterably attached to the opposite party can obtain an entrance into public life elsewhere. Although a stranger is, of course, handicapped in running against a local candidate, it is safe to say that it has been found in Canada that the stranger is, when elected, as zealous in attending to the interests of his district as the average local man. Another advantage of such a practice will be perceived when the method of selecting the cabinet is dealt with. Not only may a candidate be nominated away from home, but the Premier and leader of the Opposition sometimes run in two constituencies, either in order to insure their election or sometimes as a compliment to the

district or for the purpose of clinching a doubtful seat. If the candidate is elected in both places he resigns from one and a by-election is held to fill the vacancy.

The candidates having been selected and nominated, the only duty of the electors is to select one of them as their representative. The fate of an important question, such as that of reciprocity, will be determined by the men elected. The parties are on record as advocates or opponents of it, and each candidate who accepts a party nomination is morally bound to support his party's position, unless he makes it clear to the electorate that he intends to act otherwise.

The suffrage is practically on a "manhood" basis, and is determined by the laws of the various provinces. Only those whose names are registered can vote, and a person whose name is on the list, and is not otherwise disqualified, is entitled to cast a ballot, although he has been away from the district for months or years. No declaration of party affiliations is required before registration. Under the parliamentary system of government there has never been any other than the "short ballot." The reason is obvious. Only members of the House of Commons are elected by popular vote. The Canadian ballot is about twice the size of a playing card, and contains nothing but the names of the candidates printed in alphabetical order, their residence, and profession or business. There are no party affiliation is required before registration. Under names or other details are unknown. The ballots are supplied to the returning officers by the clerk of the Crown in Chancery and officially stamped by the former before delivery to their deputies in charge of the polling booths. The back of each ballot bears an official number corresponding to that entered opposite the name of the voter in the poll book. The names are numbered in the order in which they apply for ballots. Those electors of the city and county of Halifax who voted the straight conservative ticket at the last election marked their ballots thus:

1	EDWARD BLACKADDER of the City of Halifax, Physician.	
2	ROBERT L. BORDEN of the City of Halifax, Barrister.	X
3	ADAM B. CROSBY of the City of Halifax, Merchant.	X
4	ALEXANDER K. MACLEAN of the City of Halifax, Barrister.	

Borden and Maclean were elected. Where two members are to be elected the voter may put a cross opposite any one or two names. A vote for one man only, in such a case, is called a "plumper."

The election of a majority of the members of the House by the party previously in the minority results, as has just happened, in the retirement of the cabinet from office. This is another instance of a practice founded not on statutes, but on the automatic operation of the constitutional machinery — on obedience to what Professor Dicey calls the canons of constitutional morality. In an interesting discussion of the puzzling question as to why such canons are invariably obeyed, he finds that "the force which in the last resort compels obedience to constitutional morality is nothing else than the power of the law itself. The conventions of the constitution are not laws, but, in so far as they really possess binding force, derive their sanction from the fact that whoever breaks them must finally break the law and incur the penalties of a lawbreaker."

On placing his resignation in the hands of the Governor-General the retiring Premier recommends that his successful opponent, the Leader of the Opposition, be called upon to undertake the duties of government. The Governor-General then asks the latter to form a cabinet. How, it has been asked, has the Leader of the Opposition obtained the position which introduces him, if he can defeat his opponents, into the premiership? He is chosen by a caucus of the members of his party in Parliament, in much the same way as the speaker of the House of Representatives, except that the position of the opposition leader is not formally filled by a vote of the House of Commons. His selection is another matter beyond the pale of law. The speaker in Canada is not a leader, but a presiding officer, who, according to the tradition of his office, must be strictly impartial and nonpartisan. The new Premier having accepted office proceeds to form his cabinet. He and the members of the cabinet are not only the practical heads of the executive departments of the government, but are leaders on the floors of Parliament, and introduce, advocate, and defend the important bills relating to their departments. The Premier can therefore only choose men who have or can obtain seats in the House, though only constitutional practice and not the law thus restricts his choice. Here is to be noticed another advantage of the custom of electing nonresidents. It frequently happens that some of the men whom the Premier wishes to call upon have not been elected, either because they were not candidates or were defeated at the polls. They may, however, obtain seats by being elected in some district where the sitting member is willing to retire in their favor. The defeat of the Premier himself in his own constituency does not necessarily prevent his accession to office. Had Mr. Borden lost his own election another seat would undoubtedly have been found for him. In the election of 1904 he was defeated in Halifax, but shortly afterwards entered the House from a constituency in Ontario. Under a curious law founded on a statute more than two hundred years old, a person holding a seat in the Commons who accepts a cabinet position is required to appeal to his constituents for re-election. This law, which was passed in the reign of Anne, was intended to prevent the filling of the House with persons who owed positions of profit to the sovereign and would thus be likely to be subservient to his will. Persons re-elected after accepting office are permitted by the act to take their seats on the theory that the consent of the electors removes the objection. The Canadian statute differs slightly from the original act.

The selection of a cabinet is a task of much delicacy. Not only must the Premier choose lieutenants who will work together harmoniously, for cabinet action is always concerted action, but he is expected to see that the various sections of the country are proportionately represented, and that the men who have supported him most ably are fairly rewarded. As a rule only those who have won their spurs in the thick of the fray obtain cabinet honors. Mr. Borden's choice of a Minister of Finance is an exception to this rule. The Premier, having made up his slate, presents it to the Governor-General for formal approval. The new ministers are then sworn into office, and if members of the House, stand for re-election under the law already described. Under the advice of the Premier the Governor-General summons the new Parliament to meet on a date selected by the former. The British North America Act, the Canadian written constitution,[1] provides that there shall be a session of Parliament once at least in every year.

A change of government in Canada does not result in wholesale dismissals of public servants. The rank and file are protected by civil service rules, and under the approved practice even those positions which have been filled as a reward for party services are not vacated unless the incumbents have made themselves obnoxious to the new ruling party by a conspicuous activity in politics. Party men who secure government positions, and who wish to retain them, cease to be active partisans. Vacancies occurring subsequently, including those in the membership of the Senate, are filled with very few exceptions by adherents of the ruling side. Governorships, senatorships, and judgeships are the rewards of party men of ability and distinction.

Great Britain, Bagehot has wisely said, is "a disguised republic." The friends of the referendum and recall will, perhaps, perceive in the recent "appeal to the people" of Canada a somewhat disguised form of the measure they advocate. "The rules as to the dissolution of Parliament," says Dicey, "are, like other conventions of the constitution, intended to secure the ultimate supremacy of the electorate as the true political sovereign of the state; . . . in short, the validity of constitutional maxims is subordinate and subservient to the fundamental principle of popular sovereignty." The important difference between a referendum and a general election is that the calling of the latter is governed by principles which have been gradually established in the development of the constitution, and which, after standing the wear and tear of nearly two centuries of use, are now firmly interwoven in its texture. A general election cannot be called by any fixed number of people, and no precise measure is submitted to the electorate. They vote for men, indirectly for measures; if, as in the recent case, one proposed measure overshadows all others, the vote may decide its fate, although many voters are influenced by the personality of the candidates and by other measures of greater or less importance. If the practice is attended with a certain indefiniteness it has the merit of leaving the details of government to the discretion of men who are presumably better fitted than the mass of electors to deal successfully with them. In the words of that ultra-conservative, Mr. George Bernard Shaw, "The voter's duty is to take care that the government consists of men whom he can trust to devise or support institutions making for the common welfare. This is highly skilled work. . . . Voltaire said that Mr. Everybody is wiser than anybody; and whether he is or not, it is his will that must prevail; but the will and the way are two very different things."

W. KENT POWER.

[1] A comparison of this act with the United States Constitution will be found in an article by the writer entitled *The Canadian Constitution* in LAW NOTES for May, 1910.

RECALLING THE UMPIRE.

IT has long been expected that the progressive baseball fans would not be content until they had succeeded in putting the umpire where they could reach and dispose of him on short notice. Ever since the introduction of the recall, in fact, it has been plain to close observers at the league games that the umpire would not be permitted much longer to hand down decisions unacceptable to friends of home or other favorite teams. Fans whose sense of right and justice the umpire had frequently offended were overheard to say, from almost the first day of the recall, that the time had come at last when the arbitrary decision would be questioned and when the umpire who undertook to set himself on a pedestal above the plain people in the bleachers would be pulled down.

When the more conservative element undertook to interpose on the ground that to attack the umpire was to commit assault on the national game, the radical fans asked why the umpire should be considered a person beyond popular criticism and correction, and why his conduct, like that of all other servants of the public, should not be subjected, if and when necessary, to the operation of the referendum and the recall. It has taken time to bring the conservatives around to a point where they would consent to listen to talk like this, but they have been forced to put up with it to such an extent that now, when it is proposed that a certain percentage of fans may recall an obnoxious umpire at any time, they are silent and apparently helpless.

This illustrates present-day tendencies and the power of persistent effort in any given direction. Of course, no umpire has yet been recalled; when an attempt is made to recall one, it may be found that those who are opposed to umpires in general, and to certain umpires in particular, will see that the game cannot go on without him, and refuse to sign the petition. But the fact will be established, nevertheless, that an umpire can be recalled, and this should go far toward humbling him and showing him his place. — *Christian Science Monitor.*

Cases of Interest.

BINDING EFFECT ON SCHOOL BOARD OF RESOLUTION ADOPTING FOR A SPECIFIED TIME A CERTAIN TEXT-BOOK. — In Schroeder *v.* City of St. Paul, (Minn.) 132 N. W. Rep. 317, it was held that a resolution of the board of school inspectors of St. Paul, adopting for a term of three years a certain text-book for use in the schools, did not prevent such board from legally making a change from the text-book so adopted at any time such change was considered for the best interests of the schools, and therefore that an action would not lie by a taxpayer and parent to restrain the board from making the change. The court said: "The resolution was not a contract, and it bound neither the city nor the publisher of the books. It was an exercise of the board's power to prescribe text-books. . . . The proviso that

no change should be made for three years was of no effect. It did not prevent the board prescribing other books, if they considered a change for the best interest of the schools."

EXEMPTION FROM ATTACHMENT OF POTATO PLANTER, SPRAYER, OR DIGGER AS "NECESSARY TOOL." — In Martin *v.* Buswell, (Me.) 80 Atl. Rep. 828, it was held that a potato planter, sprayer, or digger, mounted on wheels and drawn by animals, was not exempt from attachment under a statute exempting from attachment "tools necessary for the debtor's trade or occupation," the statute not being designed to protect an extensive trade. The court said: "It cannot be successfully contended that so ponderous and complicated a device as a potato planter, sprayer, or digger is embraced within the phrase 'tools necessary for his trade or occupation.' While this statute might cover a hoe, a rake, a scythe, and other articles of husbandry, essential to the operation of the farm, to the extent of enabling the husbandman to procure a living for himself and family, it was never intended that its meaning should be so extended as to include the implements or machinery by means of which the farmer might be able to cultivate the soil, beyond the necessities of himself and family, to the extent of a profit, it may be thousands of dollars annually."

VALIDITY OF DIVORCE OBTAINED ACCORDING TO CUSTOMS AND USAGES OF INDIAN TRIBE OF WHICH PARTIES WERE MEMBERS. — In Cyr *v.* Walker, (Okla.) 116 Pac. Rep. 931, it appeared that a foreigner, born in Canada, immigrated to the United States and was adopted by the Pottawatomie tribe of Indians. After his adoption into the tribe, and after his wife, who was a member of the tribe, had died, he married as his second wife a woman who was not a member of the tribe. While he was living with the tribe upon its reservation as a member thereof, and while the tribe was under the general supervision of the federal authorities, he was divorced from his second wife, according to the customs and usages of the tribe. It was held that said divorce, recognized by the tribe as valid under its customs and usages, would be recognized and treated as valid by the courts of the State. The court said: "The courts of the American Union have, from an early time, recognized the validity of marriages contracted between the members of any Indian tribe in accordance with the laws and customs of such tribe, where the tribal relations and government existed at the time of the marriage, and there was no federal statute rendering the tribal customs of laws invalid, . . . and such marriages between a member of an Indian tribe and a white person, not a member of such tribe, have been held and regarded as valid, the same as such marriages between members of the tribe. . . . And the same effect is given to the dissolution of the marriages under the customs of the tribe as is given to the marriage relation itself."

TAXATION OF FRATERNITY HOUSE ON UNIVERSITY CAMPUS. — In Inhabitants of Orono *v.* Kappa Sigma Soc., (Me.) 80 Atl. Rep. 831, it was held that under a statute providing for taxation of real estate against the person in possession, a university fraternity in possession of a chapter house, built on the campus under a contract to purchase from the university, was liable for taxes assessed against the property; the fraternity not being exempt as a literary or scientific institution within the meaning of another statute exempting such an institution from taxation. The court said: "The University of Maine is a literary or scientific institution, and holds the legal title to the property, but it was not occupied by them for their own purposes, or by any officer thereof as a residence. It was rented by them, under a contract of purchase, to the defendant. It was occupied by the defendant for its own purposes, paying as rent therefor six per cent. on the money invested at any rent day by the university, paying the insurance and making the repairs, with a contract of purchase upon which it had paid at least $1,000. The defendant's corporate powers are neither literary nor scientific. The legal title to the property was in the University of Maine; but, as said by the court in Orono *v.* Sigma Alpha Epsilon Society, 105 Me. 217, 74 Atl. Rep. 21, 'not all the real estate of literary and scientific institutions is exempt from taxation. It is only such as is occupied by them for their own purposes, or by any officer thereof as a residence. The lot on which this building was erected was occupied neither by the University nor by any officer thereof, but by an independent corporation for its own purposes, and therefore it lost the privilege of exemption which might under other conditions attach to it.' The defendant is neither a literary nor scientific institution. It was in possession of the property taxed on the 1st day of April in the years the taxes sued for were assessed, and under R. S., c. 9, § 8, are liable for the taxes which are admitted to have been legally assessed."

SALE OF COTTON SPECIFIED AS PART OF A CROP IN EXISTENCE. — In Russell *v.* Camp (Ga.) 72, S. E. 60, it was held that where an executory contract for the sale of cotton specified that the cotton mentioned was a part of a crop in existence, and it turned out that by no fault of the seller the designated crop yielded less than the number of bales stated, and the seller delivered all of the cotton produced from his crop, he discharged his contract and was not liable in damages for failing to deliver the total number of bales stated in the contract. The court said: "We think the contract should be construed just as if it had said that Russell sold to Camp 'ten bales of cotton out of his present crop.' Thus construed, the case falls within the ruling in the leading case of Howell *v.* Coupland, L. R. 9 Q. B. 462, 1 Q. B. D. 258. In that case Coupland agreed to sell to Howell '200 tons of Regent potatoes grown on land belonging to said Robert Coupland in Whaplode,' at a certain price, for delivery during the months of September and October. At the time of making the contract, Coupland had sixty-eight acres of his farm at Whaplode devoted to the growing of potatoes, a portion of which was then sown, and the remainder of which was sown in due course. The crop yielded only eighty tons, which were delivered, and Howell sued to recover damages for the nondelivery of the residue of the 200 tons. The Court of Queen's Bench entered judgment in favor of the defendant, and this was affirmed in the Court of Appeal. The present case is even stronger, for here the crop was not only sown, but was approaching maturity, at the time of the sale, thus making even more irresistible the construction that a particular crop of cotton, and not cotton generally, was in the contemplation of the parties at the time they entered into the contract. We hold that delivery of the entire crop fulfilled the contract."

DISORDERLY CONDUCT OF COTENANT IN APARTMENT HOUSE AS CONSTRUCTIVE EVICTION. — In Phyfe *v.* Dale, 72 N. Y. Misc. Rep. 383, the action was to recover rent under a written lease. The answer admitted the making of the lease and pleaded a constructive eviction. The demised premises consisted of an apartment in an apartment house in which the common halls, elevators, and stairways were under the control of the plaintiff. The evidence showed that the tenants of other apartments conducted themselves in a noisy and indecent manner; that, owing to this conduct, the defendant, his wife, and two small children were kept awake until the late hours of the night; and that loud arguments and lewd conversations were heard nightly, and acts of prostitution were seen going on, through the open windows in the apartment below that leased to the defendant. The evidence also showed that telephone conversations, soliciting females to come to the premises for purposes of prostitution, were frequently heard by the inmates of defendant's apartment. Men and women in an intoxicated condition were shown

to have visited the house, and tenants were accosted and insulted in the elevators and halls which were under the control of the landlord. The defendant's wife was insulted in this manner while in one of the elevators. The landlord was shown to have knowledge of all of these facts, and he took no action to restore order in the halls and elevators or to remove the tenants who were guilty of the conduct complained of. Upon ascertaining that the landlord would take no action to remedy this condition of affairs, the defendant removed from the premises. It was held that the action for rent would not lie under the evidence presented. The court said: "The actions which the landlord permitted to take place in the elevators and halls constituted a common nuisance which the landlord had the complete power to abate. His failure to do so justified the defendant in vacating the premises. The defendant was not obliged, by any rule of law or reason, to remain in the premises and permit his wife to be grossly insulted and the peace and comfort of his family to be rudely interrupted. The actions complained of, in so far as they were committed in that part of the premises which were under the control of the landlord, constituted a constructive eviction."

BARN IN RESIDENCE DISTRICT AS A NUISANCE. — In Templeton *v.* Williams, (Ore.) 116 Pac. 1062, which was a suit to enjoin the use of a barn in Oregon City as a nuisance, it appeared that plaintiff was the owner of lots 3 and 4, block 62, in said city, upon which were two dwelling houses, while defendants were the owners of lots 5 and 6, of said block, upon which, within about fifteen feet of one of plaintiff's dwellings and about sixty feet from the farther house, there had been constructed a barn 40 by 80 feet in dimensions, in which were stabled some sixteen horses, defendants being in the drayage business. Plaintiff alleged that during a large portion of the year, when the prevailing wind was from the southwest, the stench and obnoxious odors from the stable were carried into the dwellings, causing the plaintiff and her tenants great discomfort, that it caused an accumulation or flies and vermin and the fostering of rodents in and about the houses, and rendered her property both less useful and less valuable. The plaintiff's allegations being sustained by the evidence, it was held that the use of the barn was a nuisance and that the plaintiff was entitled to have the same enjoined from such further use. The court said: "Since the commencement of this suit, no temporary restraining order having been issued, the barn in question has been used in the manner in which, as we understand, defendants intend to use it in the future. While they have made a strenuous endeavor to so construct the stable as to suppress obnoxious effluvia arising therefrom, and minimize the noise the horses would naturally make, connected the same with the sewer, and freely used the broom, yet doors are made to be opened, and the doors and windows of the barn have necessarily been open part of the time, with the results as indicated. From the photographs in evidence the barn is not unsightly, apparently being a useful, substantial building, and in some parts of the city would not be objectionable. But because in olden times both man and beast were housed under the same roof is no reason why at the present time a stable should be used in the residence district of a city, where it becomes a nuisance to adjacent homes. Old things have passed away to a certain extent, and many changes have taken place in the customs and manners of civilized life."

FAILURE OF TELEGRAPH COMPANY TO DELIVER MESSAGE AS PROXIMATE CAUSE OF CERTAIN PERSONAL INJURIES. — In Western Union Tel. Co. *v.* Crawford, (Okla.) 116 Pac. 925, it appeared that plaintiff's husband, for her use and benefit, delivered to the agent of the defendant at Greenwood, Ark., a telegram directed to his brother at Haileyville, Okl., reading, "Josie will be there to-night." This message was sent pursuant to an arrangement previously entered into between them that the addressee would on notice meet the said Josie, who was the wife of the sender. The agent was informed of this arrangement and that plaintiff was about to be confined, and that he was sending her to his brother's house for that purpose; that it was a message of great importance, and should be rushed through; that Haileyville was a strange town to her, and that his wife would arrive between eleven and twelve o'clock that night, and that no hacks met the trains at that hour; and that she would have with her a heavy suitcase and a two-year-old child. The train was belated, and plaintiff arrived between two and three o'clock in the morning. The telegram was not delivered, and plaintiff finding herself alone accepted the assistance of an acquaintance for a part of the way in endeavoring to find her intended stopping place, and while walking, carrying the suitcase and taking care of her child, she was ruptured internally in such a way as to cause labor pains, which continued for eight days, resulting in a dry birth with intense agony and suffering, and resulting in local impairment. It was held that the damages suffered were proximately caused by the neglect of the company to deliver the message, and that a recovery of $2,000 was not excessive. The court said: "The reason the plaintiff was left alone to make her way with her child and her grip through the night, which brought on the injuries, was that the telegram which would have afforded her a conveyance was not delivered, and this neglect is the definite, proximate cause of the damages. It is true some courts have held in cases of this character that recovery cannot be allowed, but other courts have accepted the same view which we take, and in our judgment they constitute the greater number, and carry by far the better reason to support their conclusions."

LIABILITY ON SURETY BOND GUARANTEEING FIDELITY OF EMPLOYEE. — In Buchner *v.* Title Guaranty and Fidelity Co., 144 N. Y. App. Div. 326, it appeared that the defendant issued a surety bond to A. D. Matthews Sons, a firm owning a department store in Brooklyn, guaranteeing the fidelity of one White, an agent or employee of the firm. The bond was issued on an application of the firm stating that the agent's duties were "taking orders and delivering goods sent to him C. O. D." At the time of this application and during all the time the surety bond was in force, the course of dealing between the firm and White was as follows: White was their agent for the receipt of orders and the delivery of goods on C. O. D. orders at Huntington, L. I. In addition to orders received direct from White, there was a large volume of C. O. D. orders received by mail from Huntington. The goods sent in response to the orders were shipped to White and distributed by him, and the cash proceeds collected by him and turned over to the firm. It happened, however, that many times the goods so sent C. O. D. were not taken by the parties ordering them, and in that event White either shipped them back to Brooklyn or retained them at Huntington in a storeroom until he could sell them to new customers. This practice was known to and approved by the firm, and it happened frequently that White would keep goods of the firm in the storeroom as long as four months, and amounting in value to sums exceeding $1,000. During the continuance of the bond White was found short in his account with his employer to an amount exceeding $500, but it was impossible to show whether the shortage resulted from a failure to turn over moneys collected on C. O. D. orders or from a misappropriation of goods which the firm had permitted him to retain in his storehouse for the purpose of sale to customers other than those who had ordered them originally on C. O. D. orders. On these facts it was held in an action on the bond by a person to whom the firm had transferred its cause of action against the bonding

company that the defendant was not liable for White's shortage because the application for the bond did not state fully or fairly the true extent and nature of White's duties. The court said: "The duties of White, as shown by the plaintiff's own proof, were not confined to 'taking orders and delivering goods sent to him C. O. D.,' as the application for the policy states, but he was in fact, in addition to said duties, the manager of a sort of branch shop of the firm at Huntington, with a fair supply of merchandise, making sales of goods to customers dealing with him directly and possibly on credit. Taking the whole situation as it was shown to exist, the statement in the application, though probably not intended to mislead, was in fact misleading. While the defendant was willing to take the chances of White's fidelity in 'taking orders and delivering goods sent to him C. O. D.,' with the ordinary incidents of such services, including quick remittances of moneys collected or return of goods not delivered, it was quite another thing to guarantee White's conduct as the custodian of goods for months at a time, and as practically a shopkeeper in the sale of goods so kept by him."

DETAINING SPECTATOR AT BALL GROUND AS FALSE IMPRISONMENT. — In Talcott *v.* National Exhibition Co., 144 N. Y. App. Div. 337, which was an appeal from a judgment for the plaintiff in an action for false imprisonment, the facts were as follows: On the morning of the 8th of October, 1908, the plaintiff went into the inclosure of the defendant in the city of New York to buy some reserved seats for a baseball game which was to be held there in the afternoon of that day. These seats were sold at a number of booths within the inclosure. The plaintiff was unsuccessful in his quest, as all the reserved seats had been sold. He tried to leave the inclosure through some gates used generally for ingress and exit. A considerable number of other persons were trying to leave the inclosure through the same gates at the same time. It appears that the baseball game which was to take place was one of very great importance to those interested in such games, and a vast outpouring of people were attracted to it. Many thousands of these came early in the day to seek admittance to the ball grounds, and the result was that the various gates used generally for entrance or exit were thronged with a dense mass of people coming in. The plaintiff was prevented by the servants of the defendant from attempting to pass out through this throng, and as a result of this interference he was detained in the inclosure for an hour or more, much to his annoyance and personal inconvenience. The plaintiff and those similarly situated made many attempts to get out through those gates, and in the restraint put upon them to defeat their efforts they were subjected to some hauling and pushing by the defendant's special policemen. Finally the plaintiff and the others were taken through a club house within the inclosure and allowed to go out through the entrance to the club house to the street. On these facts the judgment was affirmed by the Appellate Division of the Supreme Court for the Second Department. Mr. Justice Carr said: "Concededly the plaintiff had a legal right to leave the inclosure, and the defendant had no legal right to detain him therein against his will. But the right of each had corresponding duties. A temporary interference with the plaintiff's legal right of egress could be justified as a proper police measure if the plaintiff sought to exercise such right under circumstances likely to create disorder and danger. Assuming, however, that the defendant was justified in preventing the plaintiff from passing out through the gates in question, it should have directed him to pass out through some other means of exit, if there were any. The plaintiff told the agents of the defendant of his desire to get out, but received no directions or suggestions how to get out. The defendant claims that the plaintiff might have gone out through other gates in another portion of the field used for the entrance of motor cars and other vehicles, but the plaintiff swears that he did not know of the other gates, and there is no proof that his attention was called to them in any way when he and the others sought to go out. He got out in the end, not through the gates for vehicles, but through the club house on the permission and direction of the defendant. Granting that the restraint placed upon the plaintiff in preventing his going out through the gateways through which he sought exit was justifiable as a police measure, yet the defendant owed him an active duty to point out the other existing methods of egress. It could not stand idly by and simply detain and imprison the plaintiff against his will."

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LAW FOR THE AMERICAN FARMER.

By John B. Green of the New York bar. Pp. xvi+438. The Macmillan Company, New York, 1911. $1.50 net.

We have here a book for the American farmer, as its title indicates, it being one of the volumes which go to make up the Rural Science Series. In the preface the author says that it is primarily intended for the farmer, though the busy lawyer may find it useful as a "finger-post to authorities." The chapters deal with such subjects as the farmer before the law, the modes of acquiring a farm, title to the farm by deed, appurtenances, and easements, farm workers and laborers, the waters of the farm, irrigation, police power, pure milk laws, pure food laws, live stock, dogs, contracts, sales, common carriers, insurance, etc. The text is based on adjudicated cases which are cited in the footnotes. The book seems to have been prepared with care, and it should be useful to the class of persons for whom it is intended.

THE LAWS OF ENGLAND.

By the Right Honourable the Earl of Halsbury and Other Lawyers. Vol. 16, Highways to Income Tax, pp. ccvii+692 and Index; vol. 17, Industrial Societies in Interpleader, pp. cxciii+644 and Index. London, Butterworth & Co., 1911. Agents for the United States, Lawyers' Co-operative Publishing Co., Rochester, N. Y.

The two volumes before us contain such important titles as Highways, Husband and Wife, Income Tax, Industrial, Provident and Similar Societies, Injunctions, Inns and Innkeepers, Insurance, and Interpleader. Another title is Infants and Children. To an American lawyer the use of the word "children" in the title may seem superfluous, but in England there are numerous statutes wherein the word "child" is employed instead of "infant" to denote a person of immature years. A strange-sounding title not found in any American law books is Inhabited House Duty. That article is concerned with the tax

imposed upon the occupiers of inhabited dwelling houses in Great Britain above a certain value. While this last article is of no present consequence to lawyers practicing in the United States, the articles on the whole will be of considerable value to them.

CORPORATIONS AND THE STATE.

By Theodore E. Burton. Pp. 237. D. Appleton and Company, New York and London, 1911.

The author of Corporations and the State is the senior United States senator from Ohio. The volume has seven chapters, six of which contain the substance of a series of lectures delivered on the George Leib Harrison foundation at the University of Pennsylvania in the month of November, 1910. The seventh chapter contains an interpretation of the decisions in the Standard Oil and American Tobacco Trust cases, and aims to forecast their probable effect upon the problem of regulating corporations in the future. There are appendices which contain extracts from the opinions of Chief Justice White in the cases above mentioned, the dissenting opinion of Justice Harlan in the Standard Oil case, and a summary of the Aldrich plan for monetary legislation. The first six chapters deal with the origin of private corporations and their regulation, banking corporations, corporations and public welfare, and advisable regulation of private corporations. On account of the standing of the author as a student of present-day political conditions, his views expressed in the volume before us are entitled to consideration, and the book should be of value to other students of such conditions and particularly to those pursuing elementary courses in political science in the various colleges.

RESTRAINTS OF TRADE IN PATENTED ARTICLES.

By Frank Y. Gladney of the St. Louis bar. Pp. 406. Mazda Publishing Co., St. Louis, 1910.

The scope and purpose of this volume are stated by the writer in his preface as follows: "These pages comprise a discussion of contracts in restraint of trade in patented articles. The writing is not intended to be considered as a text book or digest of the law. The scope of the effort is far narrower than that. From beginning to end it consists of an expanded comment on two sentences of an opinion of Chief Justice Taney in Bloomer *v.* McQuewan: 'The franchise which the patent grants consists altogether in the right to exclude every one from making, using, or vending the thing patented without the permission of the patentee. This is all that he obtains by the patent.' The first ninety-nine pages constitute a sort of organon by which three groups of cases are sought to be examined and tested. These three groups are prefigured respectively by Heaton-Peninsular Button Fastener Co. *v.* Eureka Specialty Co., Victor Talking Machine Co. *v.* The Fair, and Rubber Tire Wheel Co. *v.* Milwaukee Rubber Tire Works. Unless the reader is interested in matters cognate to one or all of these cases, the volume for him has not any significance." The first chapter contains an analysis of the rights of the owner of a patent, and subsequent chapters relate to restrictions on the purchaser's use of patented articles, to restrictions on the right of resale of patented articles, and to combinations in restraint of trade in patented articles. It is clear from an examination of the volume that it is concerned with a narrow field, and that to most lawyers it will not have "any significance."

THE ADMINISTRATION OF JUSTICE IN CRIMINAL MATTERS IN ENGLAND AND WALES.

By G. Glover Alexander, M. A., LL. M., formerly scholar of Donning College; of the Inner Temple and Northeastern Circuit, barrister at law. Pp. viii+151 and Index. Cambridge University Press, London, 1911. G. P. Putnam's Sons, American representatives, New York. 40 cents net.

Volume 13 of the Cambridge Manuals of Science and Literature, a series of small volumes on literary and scientific subjects, published by the Cambridge University Press, England, is the volume before us. It tells in a brief and wholly satisfactory manner of the constitution, jurisdiction, and procedure of the various criminal courts of England and Wales, beginning with the Police Courts or Petty Sessions and continuing on and up through the Quarter Sessions, the King's Bench Division of the High Court, and the Court of Criminal Appeal, to the House of Lords. There is also a consideration of the functions of the Attorney-General, the Solicitor General, and the Director of Public Prosecutions. Moreover there is a passing reference to recent legislation by Parliament; the Probation of Offenders' Act, 1907; the Prevention of Crime Act, 1908; and the Children Act, 1908. The statistics of crime for 1908 are also given, and there are appendices containing, among other things, the classification of offenses and a list of indictable offenses triable summarily. It is really surprising how much this little manual contains, and for the American lawyer who wants a general knowledge of what it contains it is to be recommended. It is printed on good paper, and the make-up is pleasing to the eye.

News of the Profession.

FEDERAL JUDGE RETIRES. — Judge Henry F. Severens retired on Oct. 1 from the bench of the United States Circuit Court of Appeals after twenty-five years of service as a federal judge.

NEW SOUTH DAKOTA JUDGE. — Milton H. Derby has been appointed by Governor Vessey county judge for Buffalo county, South Dakota, to fill the vacancy caused by the death of F. C. Heard.

APPOINTED JUDGE OF TEXAS CRIMINAL COURT. — Governor Colquitt has approved the bill creating a new criminal court for Dallas county, and has announced the appointment of Barry Miller as judge of the new court.

MASSACHUSETTS JUDGE RETIRES. — Judge Edgar J. Sherman of Jamaica Plain retired on Oct. 1 from the bench of the Massachusetts Superior Court. Judge Sherman has been a member of the court for twenty-four years and will receive three-quarters pay for the remainder of his life.

NEW NORTH CAROLINA JUDGE. — Governor Kitchin of North Carolina has appointed Howard A. Foushee of Durham a judge of the Ninth Judicial District to fill the vacancy caused by the resignation of Judge J. Crawford Biggs, who has accepted a professorship in the Trinity Law School.

LAWYER APPOINTED SECRETARY OF STATE. — Charles Sudler Richards, a prominent lawyer of Georgetown, Del., has been appointed by Governor Pennewill Secretary of State of Delaware, to fill the vacancy caused by the death of Hon. William T. Smithers. Mr. Richards is but thirty-three years of age.

ENDS FORTY YEARS ON BENCH. — Judge William J. Forsaith of Brookline, who for the past forty years has been an associate justice of the Boston Municipal Court, resigned his judgeship on Oct. 1. Judge Forsaith is the first to take advantage of the new act which permits Municipal Court justices to retire on three-quarters pay after twenty years of service.

THE OLDEST COLLEGE GRADUATE in America is a lawyer. His name is William Rankin, and he recently celebrated his 101st birthday at his home in Summit, N. J. He is a graduate of Williams College, and practiced law for fifteen years in Cin-

cinnati, O., in partnership with Alonzo Taft, father of President Taft.

APPOINTED JUDGE OF PANAMA SUPREME COURT. — President Taft has appointed William H. Jackson, formerly of Cincinnati, O., and now judge of a minor court in the Panama Canal Zone, a judge of the Supreme Court of Panama. Judge Jackson's father, Howell E. Jackson, of Tennessee, was appointed to the United States Supreme Court bench by President Harrison.

NEVADA LAWYERS ORGANIZE BAR ASSOCIATION. — Representative lawyers from all over the State of Nevada assembled in Reno on Sept. 23 and 24 and organized a State bar association. The following officers were elected: President, Hugh H. Brown, Tonopah; vice-presidents, A. E. Cheney, Reno, and Charles B. Henderson, Elko; secretary, Robert Richards, Reno; treasurer, George S. Brown, Reno.

APPOINTED TO NEW YORK BOARD OF CLAIMS. — Governor Dix has made the following nominations for commissioners of the newly created Board of Claims: Robert L. Luce, New York; William A. Gardner, Amsterdam; James C. McDonald, Schenectady. It is said that the judges of the old Court of Claims will test the constitutionality of the act legislating them out of office.

NEW ATTORNEY FOR CHOCTAWS. — Patrick J. Hurley of Tulsa, Okla., a prominent young lawyer and politician, has been appointed attorney for the Choctaw Indians at an annual salary of $6,000. He succeeds Ormsby McHarg of New York. Mr. Hurley is twenty-eight years of age and is one of the youngest men ever intrusted with so important a position in Oklahoma. He was born in the Choctaw Nation and has been a responsible friend of Chief Locke of that tribe since childhood.

CHOSEN HEAD OF CIRCUIT JUDGES. — At the annual meeting of the State Organization of Circuit Judges of Ohio, held in Columbus on Sept. 18, Judge Louis H. Winch of Cleveland was elected chief justice and head of the organization for the ensuing year. Judge Winch has served as secretary for four consecutive years, and succeeds in his present position Judge Thomas A. Jones of Jackson. Judge Phil M. Crow of Kent was elected to succeed Judge Winch as secretary.

CONFERENCE OF GOVERNORS. — The so-called House of Governors held an interesting session at Spring Lake, N. J., about the middle of September. The necessity of a uniform divorce law was the subject of considerable discussion, and addresses on numerous other important topics were delivered by various members. A committee composed of Governors Harmon of Ohio, Hadley of Missouri, and Aldrich of Nebraska, were appointed to plead before the United States Supreme Court the right of the States to regulate railroad rates free from interference by the federal courts. Next year's conference will be held at Richmond, Va., beginning on the first Tuesday in September, 1912.

DEATH OF FEDERAL JUDGE QUARLES. — United States Circuit Judge Joseph V. Quarles died at Milwaukee on Oct. 7. Judge Quarles assumed the bench in 1905, soon after his term as United States senator expired. He was sixty-eight years old. Joseph Very Quarles was born in Kenosha, Wis., Dec. 16, 1843; graduated from the Kenosha high school in 1861, and entered the University of Michigan in 1864, but left to enlist in the 29th Wisconsin infantry. He was chosen a first lieutenant. At the expiration of his service he re-entered the University of Michigan, and graduated in 1866. He married in 1868, Carrie A. Saunders of Chicago. He was admitted to the bar in 1868. He served as district attorney, mayor of Kenosha, and a member of both houses of the Wisconsin legislature. He later practiced law at Racine until 1888, after which time he practiced in Milwaukee. He was United States senator from Wisconsin from 1899 to 1905.

MASSACHUSETTS JUDICIAL APPOINTMENTS. — Governor Foss has made the following judicial appointments: Chief Justice of Supreme Judicial Court, Arthur P. Rugg of Worcester, associate justice of the court, to succeed Marcus P. Knowlton, resigned; Associate Justice of Supreme Judicial Court, Charles A. De Courcy of Lawrence, to succeed Judge Rugg; Associate Justices of Superior Court, Richard W. Irwin of Northampton, to succeed Judge Edgar T. Sherman, resigned; Nathan D. Pratt of Lowell, to fill the vacancy caused by the death of Judge James B. Richardson; Frederick H. Chase of Boston, in place of Judge De Courcy; Municipal Court Judge, John Duff of Boston, to succeed Judge William J. Forsaith, resigned.

DEATH OF DISTINGUISHED NEBRASKA LAWYER. — General Charles Manderson, of Omaha, Neb., died Sept. 28 on board the steamship Cedric on which he was traveling from Liverpool. General Manderson was a national character in law, politics, and on the field of battle. He served in the United States Senate from 1883 to 1895, and was twice elected president *pro tempore* of that body. When Vice-President Morton died General Manderson was nominally vice-president of the United States. During the second session of the Fifty-first Congress General Manderson was elected to the presidency of that body by an unanimous vote and without opposition, an unprecedented circumstance in the Senate. Death followed a general breakdown in health, but it was possibly accelerated by the shock caused by the collision between the Olympic, on which General Manderson was a passenger, and a warship off the English coast several weeks ago.

REVISION OF PROCEDURE IN FLORIDA. — The Florida legislature of 1911 adopted a concurrent resolution, providing as follows: "That the governor be and is hereby authorized to select and appoint three lawyers of ability and discretion to constitute a commission for the purpose of examining into the laws and system of pleading and practice, embracing both common law and equity procedure, in this and other States, and to prepare such bills which in their opinion may simplify the administration of law and promote the ends of justice; and report the same to the governor at least sixty (60) days before the next session of the legislature of this State." In pursuance thereof, Governor Gilchrist has appointed Hon. James B. Whitfield of Tallahassee, Chief Justice of the Florida Supreme Court, Hon. W. A. Blount, of Pensacola, and Hon. Charles M. Cooper, of Jacksonville, to be members of such commission.

NOTED SOLDIER AND LAWYER DEAD. — Col. John James McCook, a widely known New York lawyer and member of the Ohio family known as "the fighting McCooks," died on September 17 at his summer home in Seabright, N. J. He had not been in good health for two years, but had been confined to his bed only two weeks. His death was due to pneumonia. He was sixty-seven years old.

Colonel McCook was the youngest of nine sons of Daniel McCook, who, with five sons of John McCook, all served as officers in the civil war. Colonel McCook was sevely wounded in the battle of Spottyslvania Courthouse, and was mustered out of the service as brevet-lieutenant-colonel. After the war he finished his course at Kenyon College, which he had abandoned in order to enlist, and later graduated from Harvard law school. He was senior member of Green & Alexander, one of the oldest legal firms in the United States.

President McKinley, during his first administration, offered Colonel McCook his choice of the secretaryships of war, navy, and interior, but the eminent lawyer preferred to remain in his chosen field. One of the famous cases in which he figured was the Briggs heresy case, in which Colonel McCook, as chairman

of the Presbyterian committee investigating the charges, successfully conducted the prosecution. He was a director of Princeton Theological Seminary and a member of many prominent clubs.

CANADA'S NEW PREMIER. — As the result of a political landslide almost without parallel in the history of the Dominion, Canada has decided to intrust her destinies to the safekeeping of a new prime minister. After holding office for fifteen years Sir Wilfrid Laurier has been defeated, and his place will be taken by the Hon. Robert Laird Borden, K. C., D. C. L.

The Hon. R. L. Borden was born in 1854 at Grand Pré, Nova Scotia. For some time he was a professor at Glenwood Institute, in his native province, but the law claimed him, and he was admitted to the bar in 1878. Prior to his removal to Ottawa he was head of the law firm of Borden, Ritchie & Chisholm at Halifax, and for ten years he sat as president of the Nova Scotia Barristers' Society. In 1900 he became Queen's Counsel. Four years previously he was elected to the Dominion House of Commons as member for Halifax. After Sir Charles Tupper had sustained his second consecutive defeat, in 1900, he handed in his resignation. The following year Mr. Borden became leader of the Conservative party. At the succeeding election in 1904 he not only lost his own seat at Halifax, but every constituency in his native province rejected the Conservative candidates. It was a severe blow, and Mr. Borden wished to resign his leadership; but, yielding to the appeals of his following, he accepted an Ontario seat.

At the next general election — that of 1908 — Mr. Borden regained his old seat at Halifax, and his party captured six of the eighteen seats in Nova Scotia.

The respect and esteem in which the new Prime Minister is held in Canada are based upon the enviable record of the man. He is known as a man who never took a mean advantage, whose word is as good as his bond, and whose character is absolutely beyond reproach.

FEDERAL JUDGE ADAMS DIES. — Judge George B. Adams of the United States District Court at New York died on October 9, at Hague, Lake George, N. Y. He had been ill for two years.

George Bethune Adams was born in Philadelphia in 1845, where he received his early education. He enlisted in May, 1861, on President Lincoln's first call for volunteers, and at the expiration of three months re-enlisted and served throughout the war, being transferred in 1863 to the quartermaster's department. He remained in the regular army after the close of the war until 1871, when he resigned to engage in mercantile business; he commenced the study of law in the office of Frederick S. Dickson in Philadelphia in 1876, and was admitted to the bar in 1878. He practiced in Philadelphia until 1883, when he removed to New York city, entering the law office of Beebe & Wilcox. In 1884, after the death of Judge Beebe, the firm of Wilcox, Adams & Macklin was formed, which subsequently became the firm of Wilcox, Adams & Greene.

The principal business of this firm was connected with shipping matters, which gave Mr. Adams an opportunity to become proficient in admiralty law, and he was considered one of the ablest admiralty lawyers in New York; it was his standing in this branch of law that secured his appointment. When Judge Addison Brown resigned Mr. Adams was considered an available and suitable candidate for the place, and at a meeting of the Admiralty Congress, held in July, his name was formally suggested to the President and a resolution adopted urging his appointment.

In politics Mr. Adams had always been a Republican, voting uniformly with the party and advocating its policies as formulated by the regular organization. He became a member of the Union League Club in 1888, and served as its secretary two terms, in 1894 and 1895. He had been a member of the Bar Association since 1885.

NEWFOUNDLAND LOSES DISTINGUISHED LAWYER. — Sir James Spearman Winter, K. C. M. G., of St. John's, Newfoundland, died at Toronto on October 7 after an illness of ten days.

Sir James Winter was one of the legal representatives of Newfoundland at the Hague Arbitration Tribunal with regard to the fisheries dispute, and had had much former experience on similar lines. As far back as 1887 he represented the colony at the Fisheries Conference at Washington, while he was also a delegate to London on the French treaties question in 1880, and again in 1898.

Among other important conferences in which Sir James has taken a prominent part on behalf of the colony were the Postal Conference (1898) and the Anglo-Canadian International Conference at Quebec in the same year.

Sir James was a barrister by profession, having been called to the bar in 1867, and created a Q. C. in 1880. He first sat in the colony's Parliament in 1874, and was returned on four subsequent occasions. His first official post was that of speaker, held in 1877 and the following year.

He was appointed a member of the executive council in 1879, and became solicitor-general in 1882, which office he relinquished in 1885 to become attorney-general, which he held until his party went out of power in 1889. From 1893 to 1896 he was a judge of the Supreme Court, and from 1897 to 1890 was Premier and attorney-general. Sir James was born in 1845, and was created K. C. M. G. in 1888.

MISSOURI STATE BAR ASSOCIATION. — The twenty-ninth annual meeting of the Missouri State Bar Association, of which brief mention was made in the October issue of LAW NOTES, was held on September 22 and 23 at Kansas City, Mo. The address of welcome was delivered by John G. Park, president of the Kansas City Bar Association, and was responded to by Judge Selden P. Spencer on behalf of the Missouri Bar Association. The president's annual address was delivered by J. J. Vineyard. Other speakers and their subjects were as follows: "The Artificiality of Our Law of Evidence," by Gov. Simeon E. Baldwin, of Connecticut; "Employer's Liability," by Hon. P. W. Meldrim, of Savannah, Ga.; "Experiences in England's Appellate Courts," by Dr. John D. Lawson, dean of the law school of the University of Missouri. At the banquet held in the evening of September 22, Governor Hadley of Missouri was the principal speaker. The following were elected officers of the association for the ensuing year: President, Morton Jourdan, St. Louis; vice-president, James E. Goodrich, Kansas City; secretary, John Schaich, Kansas City; treasurer, E. M. Grossman, St. Louis; general counsel, E. N. Powell, Kansas City; executive committee, John M. Barker, La Plata, and P. Taylor Bryan, St. Louis.

DEATH OF LAWYER AND LEADING PROHIBITIONIST. — Alfred Lee Manierre, who for years was a national figure in the Prohibition party and one of the managers of the National Temperance Society, died on October 1 at his home in New York city. He was fifty years old.

Mr. Manierre was born in New York city, and was graduated from Columbia University in 1883. He practiced law with success and was the leading counsel in many prominent legal battles. He was a member of the firm of Manierre & Manierre, attorneys, at No. 31 Nassau street, New York.

Twice Mr. Manierre was nominated on his party ticket for mayor of New York, and in 1902 he made the race for governor. His name was proposed for President by the New York State delegation at the national convention in Columbus, Ohio, in 1908, but he was defeated.

Besides his affiliation with national temperance movements,

Mr. Manierre was identified with many charitable organizations in New York city. He was a director and treasurer of the Red Cross Hospital, in Central Park West, and contributed much toward making it a success.

His father was prominent in politics before him, and was largely responsible for inducing Abraham Lincoln to visit New York and deliver his famous Cooper Union speech before he was elected President.

LAW SCHOOL NOTES. — The law school of Duquesne University opened its doors for the first time on September 25. — The Y. M. C. A. night law school of Cincinnati, O., opened on September 28, with a large enrolment. — The St. Paul (Minn.) College of Law opened its fall term on September 13, with the largest attendance in its history. — The Oklahoma law school of the State University opened this year with an increased enrolment. The last legislature appropriated $125,000 for a new law building. — The Detroit College of Law resumed its sessions on September 25. The trustees are seriously contemplating extending the present three-year evening course to four years. — Work on the $50,000 new law college building of St. Louis (Mo.) University has been begun. The school opened in its old quarters on September 25, with an enrolment twice as large as that of last year. — The Suffolk Law School opened its day classes in Boston, Mass., for the first time on September 27. Hitherto only an evening class has been conducted. Suffolk is the first law school in New England to have both day and evening classes. Leon R. Eyges, of Boston, has been appointed lecturer in the course on bankruptcy. — The Cincinnati (O.) Law School opened its 1911–1912 term on September 25, with the largest enrolment recorded in the last dozen years. There was one woman student, Miss Rose Shine, of Covington, Ky. The law school is not affiliated with the University of Cincinnati this year. — The first law school in Montana opened its doors to students on September 12, at Missoula, Mont. It is a department of the University of Montana, and provision for its establishment was made by a recent act of the State legislature. It gives a standard law course extending through three years. — The Albany (N. Y.) Law School opened on September 19. Six young women were among the students to enter. The three-years course will be inaugurated at the school this year. Frank White, of New York city, the well-known legal author, has tendered his resignation as lecturer on corporation law. — Edward Sampson Thurston, of the law college of the University of Illinois, former editor-in-chief of the *Harvard Law Review*, and former member of the legal firm of Strong & Cadwalader of New York, of which Attorney-General George W. Wickersham was a member, has been appointed by the Board of Regents as professor in the law college of the University of Minnesota. — Among the new auxiliary courses at the law school of the University of Pennsylvania this year there will be a series of lectures by former Attorney-General Hampton L. Carson, on "History of Legal Literature." John M. Gest will deliver a course of lectures on "Legal Biography," and W. U. Hensel will lecture upon "James Buchanan as a Lawyer." Russel Duane will offer a course on the "Trial of Cases." — The department of law of the George Washington University, Washington, D. C., opened for its forty-seventh session on September 27. An address to the students was made by the newly elected dean, Dr. Charles Noble Gregory, formerly dean of the law school of the University of Wisconsin and of the college of law of the University of Iowa. — The Washington (D. C.) College of Law opened its doors for its fifteenth session on October 2. While the college was established primarily for women, at the present time about half of the undergraduate body is composed of men and about twenty-five per cent. of the graduates are men. The school has both day and night sessions, and a three-years course leading to the degree of bachelor of laws. — The Jefferson School of Law, of Louisville, Ky., began its seventh session on October 2. Besides Judge Shackleford Miller, of the Kentucky Court of Appeals, Judge Thomas R. Gordon, of the Circuit Court, and Attorneys B. F. Washer and E. K. Pennebaker, of Louisville, the teaching force will be strengthened this year by the services of Judge James P. Gregory, Judge Walter P. Lincoln, and Attorney Robert G. Gordon, of Louisville.

DEATHS. — In addition to those mentioned above, the following deaths in the profession have occurred since our last issue: Fredrus Baldwin, Jameston, N. D.; Judge William H. Bassett, Tuscola, Ill.; Judge W. G. Blackstone, Accomac, Va.; John M. Bright, Fayetteville, Tenn.; ex-Judge William P. Britton, Crawfordsville, Ind.; Judge Arthur Brown, Louisville, Ky.; James A. Callahan, Independence, Kan.; Edward Chapin, York, Pa.; Judge Raymond T. Clark, Crowley, La.; Francis H. Clarke, Portland, Oregon; ex-Judge T. L. Denny, Cookeville, Tenn.; William B. Durant, Boston, Mass.; Charles T. Faber, Milwaukee, Wis.; Charles A. Feick, Newark, N. J.; Dana P. Foster, Waterville, Me.; James S. Gadsden, Chicago, Ill.; Louis F. Gallaudet, Jersey City, N. J.; Charles Garver, Philadelphia, Pa.; Benjamin F. Harper, Fort Wayne, Ind.; Edward Harris, Rochester, N. Y.; Judge Henry P. Hedges, Binghampton, N. Y.; Uphur Higginbotham, Charleston, W. Va.; Franklin Hinkley, Ypsilanti, Mich.; James J. Hogan, Cleveland, Ohio; D. Elwood Jeffery, Lockport, N. Y.; ex-Judge John F. Jessup, Woodbury, Pa.; Joseph B. Johnson, Newark, N. J.; John N. Kirk, Butte, Mont.; Effingham Lawrence, New York city; Judge Andrew J. Lewis, West Palm Beach, Fla.; W. J. Limerick, Jersey City, N. J.; D. Frank Lloyd, Washington, D. C.; Congressman Edmond H. Madison, Dodge City, Kan.; Judge John Henry Martin, Columbus, Ga.; Edwin McBee, Cœud d'Alene, Idaho; George W. McLean, Pittsburg, Pa.; ex-Judge William T. Minturn, Hallipolis, Ohio; Wesley Mollehan, Charleston, W. Va.; Judge H. H. Neill, El Paso, Texas; Daniel Alfred Phillips, Pittsburg, Pa.; Judge George W. Reeves, Anaconda, Mont.; Curtis H. Remy, Chicago, Ill.; former State Senator A. D. Roy, Uniontown, Pa.; Col. J. C. Roberts, Chicago, Ill.; ex-Judge L. D. Rozell, Luxora, Ark.; Frank Rudd, Brooklyn, N. Y.; D. B. Salliway, San Antonio, Texas; Thomas P. Saunders, Watertown, N. Y.; John F. Shea, Wilkesbarre, Pa.; ex-Judge S. T. Siddell, Findlay, Ohio; William T. Smithers, Dover, Del.; L. M. Sprecher, San Bernardino, Cal.; William H. Steele, Altmar, N. Y.; Col. Thos. Coleman Taylor, Hawkinsville, Ga.; Stephen Higginson Tyng, Boston, Mass.; ex-Judge Beverly R. Wellford, Richmond, Va.; Frederick B. Wightman, New Rochelle, N. Y.; L. B. Willard, Greeley, Colo.; Edward B. Young, San Francisco, Cal.; Miles Zentmyer, Schuyler, Neb.

English Notes.

LAWYERS' STRIKES. — Even lawyers have been known to go on strike. Three years ago the barristers practicing in Sierra Leone were so dissatisfied with the judge acting as substitute for the chief justice while the latter was on leave that they unanimously elected to give up pleading before him. Legal business in the colony was therefore at a standstill until the chief justice returned. France, too, affords an instance of a legal strike. One of the judges at St. Amand recently accused the local lawyers of deliberately promoting disputes in order to fill their pockets with fees. Thereupon all the lawyers in court departed in a body and forwarded a letter stating that they would not return until this insulting statement had been withdrawn.

Eventually the judge apologized and the lawyers returned to work. — *London Chronicle.*

BROTHERS ON THE BENCH. — To the many instances of brothers who have sat contemporaneously on the judicial bench may be added the case of the brothers Wilde. Mr. Serjeant Wilde was successively chief justice of the Common Pleas, raised to the peerage as Baron Truro, and Lord Chancellor of England. His elder brother, Sir John Wilde, was chief justice of the Supreme Court of Cape Colony and *ex-officio* president of the legislative council or second chamber of that colony. The Wildes supply a unique instance of two brothers presiding simultaneously as speakers of two upper chambers of legislature — Lord Truro as Chancellor and *ex-officio* speaker of the House of Lords, and Sir John Wilde as chief justice of Cape Colony and *ex-officio* president of the upper house in that colony. There are, moreover, very numerous instances of brothers being members simultaneously of the judicial and episcopal benches. Lord Chancellor Eldon, who was the son of a bishop, was a brother of two bishops — the one a bishop of the Irish see of Elphin, and the other a bishop of Bath and Wells. Lord Chancellor Thurlow was the brother of a bishop of Durham on whose issue the Thurlow peerage was entailed in special remainder. In Ireland the Hon. Francis Fitz Gerald was a baron of the Court of Exchequer from 1859 till 1882, while his brother, the Right Hon. William Fitz Gerald, was for almost the same period a member of the episcopal bench as bishop first of Cork and subsequently of Killaloe.

REPRESSIVE MEASURES AGAINST SMOKING. — A vigorous crusade is being carried on in Italy against smoking. The *Avanti* does not believe that any enactment will prove effective, and, to justify its scepticism, recalls the various repressive measures that have been adopted against nicotine in the past. In Persia the time was, we read, when the smoker, for the first offense, had his nose cut off; in the case of the recidivist — he only had one chance — he suffered the punishment of death. Under Michael Fedorovitch, in 1613, a similar law was made in Russia. Ten years later the Sultan of Turkey, Mourad IV., imitated the rigor of his neighbor the Czar. In 1660 the Senate of Berne treated smokers as malefactors, and burned them at the stake. In other states smokers were publicly whipped. In England, under James I., edicts were issued against the weed, and Parliament improved upon this severity and punished with death Raghliff [Raleigh?], the importer of the weed (*sic*). The church was not more tolerant than the secular power. On the 3d January, 1642, Urban VIII., in an interdict to the Archbishop of Seville, made tobacco smoking punishable by excommunication. Innocent XI. also forbade the use of tobacco among the clergy, making the punishment a fine of twenty-five ducats, followed by suspension. But these measures were ineffectual, and we read the Papacy capitulated before tobacco in 1725. On the 10th January in that year Benedict XIII. removed the interdicts pronounced by his predecessors, and permitted the clergy to smoke cigars in public, in order, as he said, lest "the ministers of God, in fleeing from the churches to smoke, might be found in retreats less suitable to their dignity."

HOLDING COURT IN THE OPEN AIR. — The holding of the Gainsborough County Court under a plane tree in a shady garden by His Honor Judge Sir Sherston Baker on July 25, in consequence of the tropical heat, has abundant precedents in English legal history. The court-leet, the most ancient court in England, required the attendance of all those residing within the particular hundred, lordship, or manor. It concerned the administration of public justice, and was usually held in the open air. Again, the Piepoudre Court (*curia pedis pulverisati*) was incident to every fair, to administer justice to buyers and sellers, and to redress disorders occurring there. It was always held in the open air all over England, but of late years has fallen into desuetude. Many of the older inhabitants of Bristol will remember that court being held in the open air in the old market place in that city for fourteen days, commencing on September 30 in each year. Further, a Piepoudre Court of a most transcendent jurisdiction used to be held under the Bishop of Winchester on St. Giles's Hill, near that city, in the open air during the fair time. The Court of Admiralty in the beginning of the fifteenth century was always held in the open air on a quay on the Southwark side of the river Thames. In the Rolls of Parliament (11 Hen. IV., No. 61) the Commons complain of persons being summoned by the officers of the admiralty "à Loundres a la Key de William Orton, Suthwerke." Vice-Admiralty Courts were frequently held on quays, ports, banks of tidal rivers, or on the seashore. The latest example of this may be found in the holding of a Water Court, with vice-admiralty rights, at Saltash in July, 1885, that being the last occasion of the holding of a Water Court in England. That venerable court first took its rise in the reign of King John. It was held on the beach at Saltash "within the liberty of the Water Thamer." Such examples of courts held in the open air could be multiplied *ad infinitum.*

STATUTORY REGULATION OF SURVEYORS. — The rapidity with which during recent years pioneer work has advanced in the colonies, and the consequent development of land, has brought into notice the desirability of considering whether the time has not arrived for some drastic amendments in the law relating to the qualifications of surveyors. Much importance is attached to the outcome of the work now being done by surveyors, and the future of some colonial area may largely depend on the judgment displayed in choosing the course of railways, bridges, and roads. There is at present a shortage of competent surveyors, and there is no definite standard as to what constitutes a competent surveyor, nor, again, is there an imperial opening for a person who can be said to be a competent surveyor. In consequence of these defects and inconveniences an effort has been made to arrive at some reciprocity within the empire. It is being proposed that a common system of examinations should be arranged, and that surveyors who pass the very practical tests set them should be authorized to practice in one part of the empire, and, after a time of probation in another part, should be privileged to practice there when they have satisfied the examining authority as to their acquaintance with local surveying affairs, and with the law obtaining in that locality as to the survey, registration, and transfer of land. Some such arrangements as these would prove of great benefit to all parties. Surveyors would not have to pass new examinations where the original one is recognized imperially; the colonies would enjoy a greater number of men to carry on the work in hand or under contemplation, and the whole empire would advance along the path of rapid development. The law may require some amendment to carry out these proposals, and, in any event, the profession can scarcely fail to be affected by any movement which is so likely to lead to a general improvement in business matters connected with the use of the land.

ASSAULTS ON THE JUDICIARY. — Mr. Justice Grantham, in charging the grand jury at York not long ago, referred to the case in which a man named Lount is charged with unlawfully attempting to wound Mr. Justice Ridley after the announcement of the result of the Central Hull election petition. He said he understood that the case was sent there specially to be tried, though in ordinary circumstances it would have been dealt with at petty sessions. The evidence, if true, showed that the man did throw a piece of coal at the judges or at their car as it was moving off, and hit his brother Ridley. He believed that coal had been the occasion of the heat of the election, so

he supposed the man thought a piece of coal was the best way of giving expression to his warmth on the occasion. What he did the law would in ordinary circumstances call a common assault, and it seemed to him that the character of the person assaulted ought not in such a case to alter the character of the assault. He did not think that a little ebullition of feeling by politicians at election times was necessarily a sign of malice or wickedness, but whatever was done should be dealt with at the time, or as early as possible, to prevent a continuance of ill-will in a constituency after the occasion. Throwing anything at a judge might be a serious matter, and it might be interesting to note that attacks on judges and high officers of state were nothing new. So long ago as the reign of Richard II. they were suffering, as now, and the matter was dealt with by statute. In the twelfth year of the reign of Richard II. it was ordained, "That none be so hardy to invent or say or tell any false news or lies" — they used good Saxon words in those days — "of the prelates or justices of one bench or the other," etc. So it seemed, added his lordship, that judges had suffered from attacks for six hundred years.

THE IRRESPONSIBILITY OF TRADE UNIONS. — It was inevitable that the subject of the recent strike should have formed matter for discussion by the Association of Chambers of Commerce at their sittings in Dublin. The debate was opened in the only possible manner in which a subject of so much importance should be treated. There was in it no touch of bitterness, and no desire to avenge injuries. The speaker, indeed, admitted that there were grievances requiring redress, and was willing that every reasonable opportunity should be afforded for the purpose. Evidence, however, is adducible from many centres to the effect that the irresponsibility with which trade unions are now clothed must be modified in some way. The rules regarding strikes were simply disregarded by the unions, and, in spite of this, they enjoyed a special indulgence as regards common-law liabilities. The Liverpool city justices have received and considered special reports as to "peaceful picketing," and they recommend that this subject should be treated as one outside politics, and that justices all over the country should combine to make a representation to Parliament to amend the existing law. It is in the better interests of the trade union movement itself, as was pointed out by a Dublin speaker, that power and responsibility should not be severed. No community could long exist were there to be repetitions of the scenes so lately enacted, and no statesman, whatever his party politics, could consent to legislation which should bring them about. The resolution passed at Dublin seems to afford some reasonable means for discovering a solution of the problem. It calls for the creation of a royal commission to inquire into the working of the Trades Disputes Act 1906. The result would be to show whether in fact the scenes of intimidation and disorder are or are not the direct results of that legislation, and, in the light of past experience, the public would be better able to judge as to the necessity for revising the very special favors conferred on one section of the community unless the same could be made consonant with the peace and prosperity of all sections.

JEWISH LAW LECTURER. — The appointment of Mr. Bertram Jacobs, LL.B., barrister-at-law, of the Inner Temple, as lecturer in law at the University College of Cardiff, represents the first Jewish appointment of its kind, and naturally much gratification is felt in the community. Mr. Jacobs is a member of a well-known Newport family, and received his early education at the Bristol Grammar School and King Edward's School, Birmingham, of which he was a foundation scholar. Subsequently he was articled in Newport and passed the solicitors' examinations, with honors in the final, taking the first prize in the essay competition of the Monmouthshire Law Society. He matriculated at the University of London, and in the inter. LL. B. pass he took first-class honors, with an exhibition of £40 a year for two years, and in the final he also passed with first-class honors, gaining a scholarship of £50 a year for two years and style University Law Scholar. This is the only case on record where both exhibition and scholarship have been taken by the same student.

Mr. Jacobs was called to the bar in 1903, and in the final examination he came out first class with certificate of honor and special prize of £50. Mr. Jacobs is the author of several law works, and has made numerous and valuable law translations from Latin and French. The newly appointed lecturer is a valued worker in his community and has identified himself with several Jewish institutions.

Obiter Dicta.

PUTTING IT UP. — Carpenter *v.* Brackett, 57 Wash. 460.

REVERSING THE USUAL ORDER. — Fortune *v.* Hunt, 152 N. Car. 715.

BREVITY IS THE SOUL OF DISSENTING OPINIONS. — "Jaggard, J. — I dissent." See Bjelland *v.* Mankato, 112 Minn. 27.

A BLAZED TRAIL. — "It is harder to follow the trail of the erring husband than that of the guilty wife, but in this case it is fairly well blazed." *Per* Johnson, J., in Libbe *v.* Libbe, 138 S. W. Rep. 685,

MORE NAMES. — The State of North Carolina got busy in volume 152 of its official reports and prosecuted both "Pink Dry" and "Simon Yellowday" for crimes (see pp. 813, 793).

THE FLOWER OF LOVE NO LONGER BLOOMED. — Bloom *v.* Bloom, 57 Wash. 23, was an action for a divorce wherein the court found that the plaintiff was bereft of all love and affection for the defendant.

MISLEADING. — The General Wadkins who figured in the case of Wadkins *v.* State, 58 Tex. Crim. 110, was not, as might be supposed, a military personage. "General" was the Christian name of a negro convicted of the crime of incest.

ANOTHER DEFINITION OF "NEGATIVE PREGNANT." — An applicant for admission to the Oklahoma bar last June was required to define a "negative pregnant." His answer was: "A negative pregnant is a false conception." Literally, if not technically, the answer was not half bad.

AND IT HAPPENED IN BOSTON! — The following "ad" appeared in the Boston (Mass.) *Transcript* recently:

> Lost, about September 15, a green lawyer's bag, containing paper. Reward. Address G. C. L., Boston Transcript.

QUIBBLES. — One of the meanings of the word "quibble" is a "pun." Therefore if we simply point out that the defendant in the case of State *v.* Quible, 86 Neb. 417, tried to evade the issue by quibbling (that is, he refused to give up his office to a rival and successful candidate on the ground that she was a woman) are we guilty of punning? And can there be such a thing as an "earnest" quibble? Well, that was the aforesaid defendant's name, just the same.

RECALL HIM! — The statutes of Arkansas provide that justices of the peace shall make quarterly reports to the County Court, giving a transcript of their fines imposed, the official

who is liable for the collection thereof, the nature of the case, etc. The following is a report recently forwarded to the County Court as a quarterly report of one of the justices of the peace of Polk county: "to the oneribel county cort thair is nothen duen in this cort no fines or nothen els this is true an corect. ———— j. p."

SURPASSING INGENUITY! — At a bar examination in the District of Columbia some years ago, one of the questions was: "What is meant by saying that a will is ambulatory?" A certain applicant answered as follows: "An ambulatory will is one made by a person who has been severely injured and is being hurried to a hospital in an ambulance, and whatever disposition he asks to be made of his estate will be given effect in law should he die before the same can be reduced to writing and executed in the usual way." He was admitted to the bar.

THE CY PRES DOCTRINE IN SURGERY. — One of the leading legal lights in the State of Illinois recently underwent a serious operation for the removal of gall stones. No gall stones were found, but the appendix was removed. Thereupon the Chicago *Tribune* arises anxiously to inquire if the patient entered into the contract for the operation with the understanding that the *cy pres* doctrine should apply. We imagine not, and if our surmise is correct, and the patient wants that appendix back, we respectfully suggest an action of replevin.

EMBRACERY. — Apropos of our "negative pregnant" story in the September issue of LAW NOTES, a correspondent tells the story of a student who took his bar examination in Illinois at the same time as the [illegible]ator. It was pretty close to the end of the paper and the youth had "passed up" answering enough questions to make it incumbent upon him to answer all those remaining. Therefore when he came to the question: "What is embracery?" he made the following stab, which it seems the examiner considered worthy of a license: "Embracery consists of the felonious breaking into a dwelling house at night with intent to commit rape."

JUDICIAL NOTICE OF BASEBALL. — As this issue of LAW NOTES goes to press, the series of games for the baseball championship of the world is under way. Almost everything in the way of business will be suspended during the series, and we would like to wager that if Judge Ramsey of the Texas Court of Criminal Appeals were holding court anywhere in the vicinity of New York or Philadelphia that court would be closed too. For Judge Ramsey is not like the federal judge in New York who inquired, in the course of a trial before him recently, what was meant by the baseball cognomen "White Sox." Judge Ramsey not only knows baseball, but he knows it judicially. Listen to what he says in *Ex parte* Roquemore, 131 S. W. Rep. 1104: "It is known, of course, that baseball is the most generally practiced, patronized, and approved of all the games of exercise, and that it is the cleanest and fairest of all manly sports and excites rivalry in the youths of our land, and that every village and hamlet has its favorite nine, and that in every village and hamlet many ambitious youths dream of the day when they shall equal if not excel Mathewson, Speaker, Cobb, Napoleon La Joie, and Honus Wagner."

A NOTICE TO THE GRAND JURY. — The following is a translation (we have the original) of a note handed to a county attorney in Texas not long ago for presentation to the grand jury:

"Grand Jury: there is Depridations in this neighborhood such as corn missing meat etc. suspicion pints to one Will Short and this folks are tired. He don't work but lives all the same, goes to mill and has meat to fry. Hence this appeal. Now for the names. Mr. Beaman, John Arline, George Raymond, John Odom, M. P. Boothe.

"He has allso given a mortiage on his corn crop he was to make the first to Dr. Bowen, then 2 others don't know who ask John Knight for dots."

What we would like to know is, was Will Short indicted for never being short?

A JUSTICE'S INJUNCTION. — There is no use talking, this power of the courts to issue injunctions must be curbed. The latest thing in this line comes from North Dakota, where, about a month ago, a justice of the peace issued a temporary injunction to restrain a school board from changing the location of a schoolhouse. The applicant was a minister of the gospel. The justice informed the applicant that his right to issue the restraining order was governed by the North Dakota statute providing that "the writ of injunction as a provisional remedy is abolished, and an injunction by order is substituted therefor." The reasoning of the justice was as follows: A justice having the power to make an order where a motion is made in an action pending before the court, the jurisdiction should not be limited to any specific class of orders. The State's attorney of the county was able to induce the justice of the peace to dismiss the proceeding after making two trips to the Justice Court, traveling approximately sixty miles.

ALL MEN ARE LIARS. — A bright young attorney rather given to strenuous oratory was employed to defend a man charged with aggravated assault and battery. The facts were that the defendant had been called an Irish liar, and had resented the insult by seriously injuring the insulter. The young attorney in his address to the jury first discussed the defense generally, but warming to his subject, addressed a German juror as follows: "Mr. Herman, if a man should call you a German liar wouldn't you try to break his face?" To a Jew juror: "Mr. Einstein, if a man should call you a Sheeney liar, would you not strike him with any weapon at hand?" To an Irish juror: "Mr. McGinty, if a man should call you an Irish liar, wouldn't you try to kill him?" And then carried away by his own eloquence, he addressed the remaining nine jurors of uncertain nationality: "And you other members of the jury, if a man should call you the various kinds of liars that you are, wouldn't you slay him if you could?" The jury stood nine to three for conviction.

KEEPING THE WORD OF PROMISE TO THE EAR. — A correspondent writes us:

"The question in Reid vs. Owensboro Savings Bank Co., 141 Ky. Reports 447, is whether a disappointed litigant has right or excuse to burst forth in the language of Macbeth,

> "'Be these juggling fiends no more believed
> That palter with us in a double sense,
> That keep the word of promise to our ear
> And break it to our hope,'

because the court thus disposed of his rights:

"'It is well settled that when a purchaser of shares of stock in a bank or other corporation is induced to make the purchase by reason of the false and fraudulent representations of the officers and directors of the corporation that the concern is solvent and the shares worth the amount at which they are offered to be sold, the purchaser may upon the discovery of the fraud, if action is brought within reasonable time, and *during the solvency* of the corporation, have a cancellation of the stock and a return of his money.'"

For reasons of self-protection our correspondent does not want his name mentioned, but any one of our readers may verify the quotation for himself.

A LIKELY YARN. — We reproduce the following yarn exactly as it was given to us, and in so doing disclaim any and all responsibility for the truth thereof:

During the reconstruction period in the South there were many damage suits brought by Union or loyal men against ex-Confederates. Only "*loyal*" men were on the bench at that time. In one of the mountain counties of Tennessee a suit was brought by a Union man against a Confederate for an alleged or imaginary damage. Judge H——— (a strong Union partisan) was on the bench. Col. C——— (a strong Union partisan) represented the complainant. Col. S——— (an ex-Confederate) represented the defendant. The case was tried before a jury of Union men, and judgment was promptly rendered for the full amount for the complainant. There was little if any proof to sustain the charge. The defendant's attorney moved for a new trial, stating his grounds orally, citing law to sustain him, and suggesting that the proof did not warrant the verdict. This was immediately overruled, and he was reprimanded severely by the court. Then the defendant's attorney prepared a bill of exceptions, stating all the material facts of the case. This he presented to his adversary counsel, who, after reading it, said it was not the truth and he would not sign it. Thereupon he presented it to the judge, who, after reading it, said it did not state the facts correctly and did not state his charge and rulings correctly, and that most assuredly he would never sign such a garbled and incorrect bill as that. The young barrister, who is still living, and now an active practitioner in his county, was not at all abashed by them. For he thought he had a remedy. He would apply this remedy and go to Texas on the first train he could reach. He saddled his horse — a good horse — put his spurs on, put all his papers and books in his saddle riders, and went to the hotel where the judge and opposing counsel were stopping, hitching his horse just at the door. Knocking on the door of the judge's room, he was invited in. Walking in with his bill of exceptions in one hand and an army pistol in the other, he found the judge and his opposing counsel. He then presented his bill of exceptions to the judge, saying: "You have treated me like a ——— dog. Now sign this bill of exceptions here and now, or I will blow a hole in you big enough to throw these papers through. — Now, Col. C———, you have not done me right, and I will not fool much with you either, until I do you the same way." Holding his pistol still in his right hand, he presented the bill of exceptions to the judge with his left and told him he was in a hurry. Judge H——— and Col. C——— sat facing one another across a small table. Judge H——— asked Col. C——— if he had read the bill of exceptions, and was answered in the affirmative. "Do they state the facts about as they occurred?" "Yes, a very fair statement," said Col. C———. "What would you do about them?" asked Judge H———. "I think I would sign it, judge," replied Col. C———. "Well, I have read it, too, and think it a fair and impartial statement of all that occurred on the trial." The bill of exceptions was signed.

Correspondence.

COMPELLING ACCUSED TO GIVE EVIDENCE AGAINST HIMSELF.

To the Editor of LAW NOTES.

SIR: In your September issue, on page 116, under subhead "A Spelling Mistake," a case is noted in which the defendant was required to write a sentence, which she did, and therein misspelled the word "skinny" in the same manner it had been misspelled in the alleged libelous article. She also made the same mistake in orally spelling the word, and the jury, from this fact it is presumed, found her guilty.

In most civilized countries the humanity of the laws protects defendants from the hardship of testifying against themselves. Does not the compelling of a defendant to write certain words or sentences from which, by comparison of the handwriting or spelling, guilt may be inferred, amount in fact to coerced testimony against one's self? Will some of your learned writers or correspondents answer the question?

C. B. CLARK.

ALTOONA, PA.

PROCURING ADMISSION TO THE BAR BY FRAUD.

To the Editor of LAW NOTES.

SIR: After reading your editorials in the October number as to admission to the bar, the following facts in *In re* Mars, tried at this city (the undersigned having been appointed special prosecutor to prosecute the disbarment proceedings), may be of interest. Under our statute, when charges are preferred they are presented to the judge of an adjoining circuit, who appoints a prosecutor to prosecute, and in the instant case one of the charges was fraudulently securing the certificate of admission.

The case was tried and decided last June, and the situation on this point is shown by the finding of fact and conclusion of law made by the court, as follows:

(*Finding of Fact.*)

"The defendant took the State bar examination and failed in the year 1895, and also 1896, whereupon, in order to avoid the delay and uncertainty attendant upon taking the next examination to gain his admission, and for the sole purpose of gaining admission to the bar of Wisconsin through an admission in another State, this defendant some time in December, 1896, went to the State of Florida, taking with him letters of recommendation from lawyers and judges of Ashland as to his moral standing and legal capacity. By means of these and an examination conducted by an examining committee, this defendant was, on the 13th day of January, A. D. 1897, admitted by the Circuit Court for Escambia county, Florida, to practice as an attorney at law in the courts of Florida other than the Supreme Court. The Florida statutes at that time contained no specific provision either permitting or prohibiting nonresidents being so admitted, and no construction of that statute on this point has been shown.

"On January 14 the defendant applied to one of the justices of the Supreme Court of Florida for admission, took the oath of office before the clerk on that day (the said court not being in session), and at the next session of court on January 19, 1897, pursuant to such oath so taken, was admitted to practice in the Supreme Court of the State of Florida. At the time of such admission the defendant was in the city of Ashland, having left Florida immediately after taking his said oath of office, with no intention of returning. The defendant had no intention of becoming a resident of the State of Florida or of changing his residence from the county of Ashland.

"On the 25th day of January, 1897, the said defendant applied to the Circuit Court for Ashland county for admission to the bar of Wisconsin upon said certificate from the Supreme Court of Florida, and upon the same was admitted to practice.

"I find the defendant not lawfully entitled to admission upon such certificate, since the procedure by which it was obtained was in circumvention of the true intent and meaning of the statutes of Wisconsin, which were never intended to authorize a resident of this State to remove temporarily to another State without changing his residence, there be admitted, and immediately return to Wisconsin and be admitted here upon the certificate there obtained, when he would not otherwise be admitted in this State to so practice. But I further find that the order of the Circuit Court of Ashland county, so admitting him, has determined this matter in favor of the defendant, which decision is conclusive."

(*Conclusion of Law.*)

"I conclude that the defendant's license to practice law was not lawfully issued upon the facts as they now appear, but that the issuance of same is a binding adjudication upon such facts, and except for the other facts herein found the defendant is the lawful holder thereof and entitled to practice thereunder."

The defendant was disbarred on other grounds, but this situation and decision may be of interest as showing one possibility which exists under lax statutes and procedure.

C. B. BIRD.

WAUSAU, WIS.

Law Notes

DECEMBER, 1911.

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CONTENTS

MR. JAMES COCKCROFT, the founder of the law publishing house of Edward Thompson Company and for many years its president, died at his home in Northport, Sunday, Nov. 12, 1911. A sketch of his life will appear in the January number of LAW NOTES.

Effect of Justice Harlan's Death.

THE death of Mr. Justice Harlan removes from our highest court one of its ablest members. It can be said of him that while his mind very frequently did not act in harmony with the minds of his associates he was actuated at all times by a deep sense of the responsibilities of his office, and his opinions were the result of careful consideration and honest convictions. His death must be deeply felt by his associates. No new judge can fill at once the place of a deceased old member. It is safe to say, however, that President Taft, who has made an enviable reputation in his judicial appointments, will see to it that the vacant place is filled with a lawyer who will measure up to the high standard set by former Presidents in filling vacancies.

Waiver of Jury Trial under the New Federal Judicial Code.

UNITED STATES REVISED STATUTES, § 566, 4 Fed. Stat. Annot. 236, provides that "the trial of issues of fact in the district courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury." R. S., § 648, 4 Fed. Stat. Annot. 389, makes the same provision for trial of issues of fact in the circuit courts, except as otherwise provided in the next section (§ 649, 4 Fed. Stat. Annot. 393), which is as follows: "Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." R. S., § 700, 4 Fed. Stat. Annot. 450, provides as follows: "When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment." Neither of those Revised Statutes sections (§§ 566, 948, 949, and 700) is among the sections enumerated as repealed in section 297 of the new Judicial Code, for the very good reason that the Judicial Code makes no provision whatever on the subjects covered by those sections. Now let us see what will be the predicament of practitioners in the federal courts after Jan. 1, 1912, when the Judicial Code takes effect. In cases covered by R. S., § 566, still in force, as we have said, there is no statute in existence which provides for a trial in the District Court by the court without a jury. "There are no similar provisions in regard to trials without a jury in the district courts, to those found in §§ 649 and 700 in respect to circuit courts." *Rogers* v. *U. S.*, 141 U. S. 548, 554. It was therefore held in *U. S.* v. *St. Louis, etc., R. Co.*, (C. C. A.) 169 Fed. Rep. 73, that where an action at law triable by a jury under R. S., § 566, is by consent of the parties tried to the court without a jury, *no question of fact or law decided upon or in connection with the trial is subject to re-examination in an appellate court.* See also *U. S.* v. *Louisville, etc., R. Co.*, (C. C. A.) 167 Fed. Rep. 306; *U. S.* v. *Cleage*, (C. C. A.) 161 Fed. Rep. 85. Consequently, if the parties waive a jury trial pursuant to R. S., § 649, in a case in the District Court after January 1st, the defeated party may find that he committed a very prejudicial blunder by his waiver. Wouldn't he be foreclosed from obtaining a review as provided in R. S., § 700, if the case were one that would have been triable in the District Court prior to the abolition of circuit courts by the Judicial Code, § 289? Wouldn't that be especially true if the case were one of which the district courts prior to the enactment of the Judicial Code had *exclusive* jurisdiction? And if it were a case of jurisdiction concurrent in the district and circuit courts, by what authentic means can it be determined after next January whether the case shall be regarded as if it were in the old District Court or in the old Circuit Court, as far as waiver of a jury trial is concerned?

Judicial Code, § 291, provides: "Whenever, in any law not embraced within this Act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall, upon the taking effect of this act, be deemed and held to refer to, and to confer such power and impose such duty upon, the district courts." The Committee on Revision have provided no gloss for that section, and we doubt whether it was in-

tended to effect a transfer of R. S., §§ 649 and 700, to the cases described in R. S., § 566. Despite the repeated judicial constructions of R. S., § 566, as above given, Congress has not seen fit to bring it within the provisions of sections 649 and 700, and the Committee on Revision have been chary of taking liberties of that sort. Early in the coming session of Congress the difficulties we have pointed out, if they are real, can be easily remedied.

Right of Employer to Indemnity from Negligent Employee.

CASES where a master has sought to recover from one of his servants the damages which the master has been compelled to pay to another servant on account of injuries suffered from the negligence of the defendant servant, are not often found in the reports. Of course they could not arise in cases where the servants were fellow servants and the fellow-servant doctrine of nonliability had not been abrogated by statute; for the master not being legally liable in such cases, he could have no legal claim to indemnity for purely voluntary payment of money to the injured servant. A late case in England suggests to us the question whether under workmen's compensation acts, as they are framed at present, an employer who has been subjected to payment of "compensation" for injuries acquires any greater right than he formerly possessed in respect of indemnity from a servant whose act or neglect caused the injuries. The English Workmen's Compensation Act of 1906 enacts that: "If the workman has recovered compensation under this act the person by whom the compensation was paid, and any person who has been called on to pay an indemnity under the section of this act relating to subcontracting, shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by action, or by consent of the parties, by arbitration under this act." Evidently the act does not undertake to give to the award of compensation any conclusive or even *prima facie* status when the employer seeks to recover indemnity against another servant. In *Lees* v. *Dunkerley Brothers,* [1911] A. C. 5, decided a year ago, the respondents, who were cotton spinners, employed the appellants to mind the dangerous machinery in their factory. By the negligence of the appellants in starting the machinery and their breach of the regulations under the Factory and Workshop Act of 1901, a boy employed in the factory under the direction of the appellants was injured. Upon an application for arbitration and compensation to the injured boy the County Court judge awarded a weekly sum to be paid to the boy by the respondents. By the consent of the parties the liability of the appellants to indemnify the respondents in respect of the compensation was left to the County Court judge to settle in the arbitration, and he held that the appellants were liable to indemnify the respondents against compensation. The decision was affirmed by the Court of Appeal and then by the House of Lords in the case cited. The courts held that the defense of common employment, urged in the case, is not applicable in a case where injury is caused to a servant by the breach of an absolute duty imposed by statute upon his master for the servant's protection. But the ruling seems to have proceeded upon the ground of a fellow servant's liability for his own negligence regardless of the statutory regulation involved in the case.

The Massachusetts Workmen's Compensation Act, recently enacted, provides in section 15: "Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the [employer] to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages or against the association for compensation under this act, but not against both, and if compensation be paid under this act, the association may enforce in the name of the employee, or in its own name and for its own benefit, the liability of such other person." Thus the employer is expressly subrogated to the injured servant's rights against a fellow servant under "legal liability" to pay "damages" to the injured servant. In ascertaining the fact or the amount of that "legal liability" would the award under the compensation act operate to aid the employer? In our opinion the employer would have to make out his case precisely as if there had been no proceeding under the compensation act.

A Typical "Hard Case."

IN *Lydon* v. *Edison Elec. Illuminating Co.,* (Mass.) 95 N. E. Rep. 936, decided two months ago, the plaintiff's intestate was instantly killed by reason of his hand coming in contact, at a place where the insulation had been worn off, with an electric light wire running through a tree and maintained by the defendant. The trial court had refused to direct a verdict for the defendant, and in the Supreme Judicial Court it was assumed, for the purpose of the case, that there was sufficient evidence of negligence on the part of the defendant. Nevertheless, without any evidence of plaintiff's contributory negligence, the defendant escaped liability. On a public highway was one of defendant's large poles with two cross-arms. From the lower cross-arm three telephone wires passed through the tree, and from the upper seven electric light wires, including the one by which the plaintiff's intestate was killed. The deceased had gone up into the tree for the purpose of destroying moths' nests.

"There was evidence tending to show that he went up till he was about a foot above the electric light wire, and that he was from fifteen to eighteen inches to one side and northerly of the wire which killed him and on the side next to the street. In going up he went one side of the wires and not through them so far as appeared. Before going up his attention had been called by the foreman to the place on the wire where the insulation was worn off, and he passed the wire safely in going up. Worn places on wires were not uncommon, and the men were expected to look out for them and to warn each other. The evidence tended to show that after he had finished cutting off and painting the nests he passed down his cutting pole and the swab with which he had been painting the nests and prepared to descend along the limb where he was. While going down he asked one of the men, who was in the tree and back to back with him and about five or six feet away on the opposite side of the tree, whether he thought a certain wire was a street light, and the man said he thought it was, and the foreman, who was on the ground and heard the question and answer, thereupon said that if it was 'there is no current on.' The man of whom the question was asked testified that the deceased pointed to the second wire and not to the one by which he was killed. But the jury might have found that he was mistaken and that the deceased pointed to the other wire, the one which killed him. At the time when he asked the question the deceased had

descended several feet. This was the last time that he was seen alive. Shortly after, the time varying according to the witnesses from two seconds to half a minute or more, one of the men heard a groan and looking up saw the deceased about a foot below the wire with his left arm extending up above his head in a bent position and the inside of the tip of the third finger in contact with the wire at the place where the insulation was worn off. The deceased was standing rigid, bent a little backward, with the spur on his right foot driven into the limb. His hold on or contact with the wire was broken as soon as possible, and he was taken down, but was found to be dead."

It was held that there was no evidence to warrant the jury in finding that the plaintiff's intestate was free from contributory negligence. In order to make the contact with the wire he had to raise his hand about a foot above his head after he had come down safely by the wire. "If, bearing in mind what had been said to him to the effect that if the wire was a street wire the current was not on, he chose to touch it for the purpose of testing the truth of the remark," said the court, "it is manifest that he took the risk and the defendant is not liable. If, as he went down, he accidentally slipped or lost his balance and instinctively and naturally threw up his hand and happened in that way to touch the wire, that would not be inconsistent with due care on his part. *Garant* v. *Cashman,* 183 Mass. 13, 66 N. E. Rep. 599. But whether he did so or not is wholly a matter of conjecture. . . . It is impossible to say that the fact that a man has been careful down to the instant before he is injured warrants of itself the inference that he was in the exercise of due care the instant after, when the accident occurs." But the same court would not find it "impossible" to infer that a man proved to be refraining from excessive use of intoxicating liquors down to a particular time continued to be abstemious until some evidence was produced to the contrary. See *McCraw* v. *McCraw,* 171 Mass. 146, 50 N. E. Rep. 526. We are not sure that the two cases can be distinguished without confusing intellectual subtlety with common sense.

"The case is a hard one," concluded the court, "but we feel compelled to say that there was no evidence warranting a finding that the deceased was in the exercise of due care when he was killed."

"Hard Case" Criticised and Remedy Suggested.

THE rule which prevails in most jurisdictions is that, in the absence of all evidence tending to show whether a person stopped, looked, or listened before attempting to cross a steam railroad or electric railway track, the presumption arising from the instinct of self-preservation is that he did. This is emphatically the rule in the United States Supreme Court, and Mr. Justice McKenna, speaking for that court, said: "The presumption is founded on a law of nature. We know of no more universal instinct than that of self-preservation — none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming, and death. There are few presumptions, based on human feeling or experience, that have surer foundation." *Baltimore, etc., R. Co.* v. *Landrigan,* 191 U. S. 461, 474, 24 S. Ct. 137. It seems clear, therefore, that the United States Supreme Court would have perceived in the Massachusetts case evidence from which a genuine inference of due care on the part of the deceased could fairly be drawn, as distinguished from pure and inadmissible conjecture. That is to say, according to our view, if Mr. Justice McKenna and his associates had participated in the decision of the Massachusetts case they would have disagreed with the justices of the State court. If our assumption is correct, surely, then, we are not guilty of excessive boldness in questioning the validity of the conclusion reached in that case. We understand it to be the universally accepted doctrine in actions on life insurance policies that there is at the outset a natural and legitimate presumption against suicide. But is it not true that more persons commit suicide than are killed by their own negligence at railroad crossings? Do not sane men almost invariably shun wires that are believed to be carrying deadly electric currents? "Human nature is part of the evidence in every case," said the Supreme Court of Rhode Island in a recent opinion. In the face of that kind of evidence it is hardly too much to say that Mr. Justice Morton's suggestion that if the deceased chose to touch the wire for the purpose of determining whether or not it was really an instrument of death, "it is manifest that he took the risk," was a piece of unseemly levity in a case conceded to be one of hardship. The rule prevailing in Massachusetts and a few other jurisdictions which places upon the plaintiff the burden of proving freedom from contributory negligence is chiefly responsible, we believe, for a great many hard cases that appear in the reports. But the rule can be abolished by statute — it has been so abolished in Indiana — and then a defendant will be justly subjected to damages when his negligence is satisfactorily proved in cases where the plaintiff's contributory negligence has not been removed from the realm of conjecture. In other words, judgment will be based upon known delinquency instead of upon possible but unknown contributory fault.

Anti-trust Legislation in New Zealand.

SINCE the operations of the American trusts have been extended to the British dominions, legislation has become necessary to limit their powers. One of the latest examples is an act passed by the New Zealand Parliament. It was in 1896 that the activities of the International Harvester Trust first led the parliament to take action, which was specifically limited to dealings in agricultural implements. The New Zealand acts have retained that characteristic, which distinguishes them from the Canadian and Australian laws, in applying only to certain goods. The last act for the repression of monopolies in trade or commerce applies to the sale of agricultural implements, coal, meat, fish, flour, oatmeal and the other products or by-products of the milling of wheat or oats, petroleum or other mineral oil (including kerosene, naphtha, and the other products or by-products of any such oil), sugar, and tobacco (including cigars and cigarettes). A commercial trust is defined to be any association or combination of any number of persons "having as its object or as one of its objects that of (1) controlling, determining, or influencing the supply or demand or price of any goods in New Zealand or any part thereof or elsewhere, or that of (2) creating or maintaining in New Zealand or any part thereof or elsewhere a monopoly, whether complete or partial, in the supply or demand of any goods." It is an offense against the act to make any special concession in consideration of dealing only with a particular person or in a particular class of goods. Similarly, a refusal to deal except upon disadvantageous or relatively

disadvantageous terms is an offense. The sale of goods at a price, fixed by a trust, which is unreasonably high is also punished by the act. The price of any goods is deemed by the act to be unreasonably high "if it produces or is calculated to produce more than a fair and reasonable rate of commercial profit to the person selling or supplying, or offering to sell or supply, those goods, or to his principal, or to any commercial trust of which that person or his principal is a member, or to any member of any such commercial trust." The punishment for an offense against the act is a fine of £500. Two or more persons concerned in the same offense are each liable for the amount of the fine, recoverable by an action in the Supreme Court, which has power to reduce the amount and also grant a perpetual injunction against the repetition of the offense.

Comparative Amount of Litigation in the States.

COMMENT was made in LAW NOTES a few months ago on the fact that in several of the States the volumes of published reports of cases decided in the courts of last resort equaled or exceeded two hundred in number. That fact is interesting, because, if nothing else, it serves to call attention to the difficulty which will beset the average lawyer at no far distant time in housing the reports of his own State, let alone those of sister jurisdictions. As a matter of comparison, however, of the respective amount of litigation in the various States and Territories, the fact, taken alone, that in some instances two hundred or more volumes have been issued is of little significance in view of the great disparity in the ages of the States of the Union. If, however, in addition to the total number of reports issued, we can ascertain approximately the number of reports issued in each jurisdiction within a given period, we have some basis for comparing the amount of litigation before the courts in the various sections of the country, at least such litigation as ultimately reaches the final appellate tribunals. Suppose then we take the period from about Jan. 1, 1905, to date — nearly seven years — and arrange the States and Territories alphabetically, giving the number of reports issued in each during the period mentioned. The result is as follows: Alabama, vols. 140–168, or 29; Alaska, vol. 2; Arizona, vols. 5–12, or 8; Arkansas, vols. 72–95, or 24; California, vols. 144–158, or 15; Colorado, vols. 32–49, or 18; Connecticut, vols. 77–83, or 7; Delaware, vols. 4–6, or 3; District of Columbia, vols. 24–36, or 13; Florida, vols. 44–59, or 16; Georgia, vols. 120–135, or 16; Hawaii, vols. 16–19, or 4; Idaho, vols. 8–19, or 12; Illinois, vols. 211–251, or 41; Indian Territory, vols. 4–7, or 4; Indiana, vols. 161–173, or 13; Iowa, vols. 124–147, or 24; Kansas, vols. 68–84, or 17; Kentucky, vols. 114–142, or 29; Louisiana, vols. 113–127, or 15; Maine, vols. 99–106, or 8; Maryland, vols. 98–114, or 17; Massachusetts, vols. 186–208, or 23; Michigan, vols. 132–165, or 34; Minnesota, vols. 91–113, or 23; Mississippi, vols. 83–96, or 14; Missouri, vols. 180–234, or 55; Montana, vols. 29–42, or 14; Nebraska, vols. 66–88, or 23; Nevada, vols. 27–32, or 6; New Hampshire, vols. 73–75, or 3; New Jersey, vols. 70–80 Law, and 65–77 Equity, or 24; New Mexico, vols. 11–15, or 5; New York, vols. 179–201, or 23; North Carolina, vols. 136–154, or 19; North Dakota, vols. 12–18, or 7; Ohio, vols. 70–84, or 15; vols. 14–28 Sup., and 1–5 Crim., or 20; Oregon, vols. 44–55, or 12; Pennsylvania, vols. 210–230, or 21; Rhode Island, vols. 25–30, or 6; South Carolina, vols. 68–87, or 20; South Dakota, vols. 16–25, or 10; Tennessee, vols. 110–122, or 13; Texas, vols. 97–102 Sup., and 45–59 Crim., or 21; Utah, vols. 27–36, or 10; Vermont, vols. 76–83, or 8; Virginia, vols. 102–111, or 10; Washington, vols, 35–61, or 27; West Virginia, vols. 54–68, or 15; Wisconsin, vols. 120–145, or 26; Wyoming, vols. 12–17, or 6. In the federal jurisdictions we find: U. S. Supreme Court, vols. 195–221, or 27; Federal Reporter, vols. 139–187, or 49.

Significance of Statistics Concerning Official Reports.

WE note at once with respect to the foregoing figures that Missouri leads the list with fifty-five reports in seven years, or eight volumes a year. In explanation of this large output, however, it must be said that a volume of the Missouri reports contains only about one-half as many cases as the ordinary State report, for the reason that practically every opinion reported includes an exhaustive review of the facts of the case. Next in order is the Federal Reporter, which seems to issue at the rate of seven volumes per year, but it should be noted that the scope of this series of reports includes nine Circuit Courts of Appeals and all the Circuit and District Courts in the federal jurisdiction. With respect to several other jurisdictions, be their output large or small, a word of explanation or information is due. Thus, in Delaware and New Jersey, the reports contain opinions of the lower as well as the final courts. In California the reporting of decided cases was considerably delayed, during the period to which we have reference, by the earthquake calamity. In Kentucky nine reports have been issued in the last fourteen months, owing to the commendable desire of the reporter to catch up with his work; and as to both Kentucky and Tennessee it is to be observed that there are omitted from the reports of those States hundreds of cases decided every year but marked by the courts "not to be officially reported." A recent increase in the number of Oklahoma reports is ascribable to the inclusion of Indian Territory cases in those volumes, both civil and criminal. Apart from the jurisdictions thus mentioned, where the situation is more or less affected by special circumstances, it will be seen that Illinois sets the pace with forty-one reports. No explanation of this fact is readily discernible. As compared with New York, Illinois publishes almost twice as many reports for its court of last resort, although both States have inferior appellate courts and in neither State are the judges unusually verbose either in stating the facts or in applying the law. It is interesting in this connection to note that Massachusetts, Minnesota, and Nebraska are exactly on a par with New York in the matter of number of volumes issued. It is also noteworthy that in Texas a large majority of the reported decisions are handed down in criminal cases. Disregarding further detail, a general summary of the statistics given seems to suggest that there is quite a little more litigation in the Western or new States than in the old commonwealths of the East. Perhaps this would not be true if all the *nisi prius* trials and the decisions of inferior courts were included in the reckoning, but it is at least true with respect to litigation before the courts of last resort.

Restricting the Number of Lawyers.

THE mad rush of the present day to secure licenses to practice at the bar, with the resulting inevitable degeneration of the profession as a whole, suggests the imperative need of curative legislation. Perhaps some such a law as the following, adopted in Connecticut in 1730, might fill the bill:

"An Act relating to Attornies passed May 1730 by the General Assembly of Connecticut.

"Whereas many persons of late have taken upon them to be attorneys at the bar so that quarrels and lawsuits are multiplied, and the King's good subjects disturbed: To the end therefore that said mischief may be prevented and only proper persons allowed to plead at the bar, as well in behalf of our Sovereign lord the King as of his good subjects; and that the fees of attorneys may be stated and known; and for the better regulating of all proceedings at the bar,

"*Be it enacted* by the General Council and Representatives in General Court assembled, and by the authority of the same,

"That there shall be allowed in the Colony eleven attornies, and no more, (viz.) three attorneys in the County of Hartford, and the other four counties to have two attorneys to plead at the bar in each respective county and no more; which attorneys shall be nominated and approved from time to time, as there shall be occasion, by the County Courts; each County Court to appoint the number of attorneys hereby allowed in the County where such Court doth preside.

"*Be it further enacted* by the authority aforesaid, That in all actions where the title of land is not concerned and the demand is not above £10, there shall not be allowed to plead at the bar more than two attorneys; each party to improve one attorney and no more. And in all actions where title of land is concerned, or the demand is above £10, there shall be allowed to each party two attorneys to plead at the bar and no more.

"*Be it further enacted* by the authority aforesaid, That the attorney's fees at the County or inferior Court in each action pleaded by such attorney shall be 10 shillings and no more; and at the Superior Court 20 shillings and no more, and for the future, the party which shall recover judgment in any of the said courts shall have attorney's fees, according to the above regulation allowed as part of costs at trial.

"*Be it further enacted,* That in each County there shall be one King's Attorney, which shall plead and manage in the County where such attorney is appointed, in all matters proper in behalf of our Sovereign lord the King, which attorneys shall be appointed by the respective County Courts, and be of the number of attorneys allowed as aforesaid.

"*Be it further enacted,* That the several attorneys that shall be allowed and appointed as aforesaid shall from time to time be under the direction of the Courts aforesaid, before whom they shall plead, who, upon just reason, shall and may displace and wholly suspend any of said attorneys or otherwise proceed against them or any of them that shall transgress the orders or rules of any of said Courts, as the law directs."

Fines for Smugglers.

THE federal judges have received considerable newspaper abuse of late on account of their method in meting out punishment to smugglers. The criticism has been freely made that the wealthy smuggler has been let off with a mere fine while the petty smuggler has been sent to jail. We hold no brief for either side in this controversy, but the fact that lawyers dearly love an argument prompts us to suggest one to our readers. May not the course of justice adopted in these cases be clearly justified by the nature of the crime and the circumstances of the respective offenders? Smuggling is an offense against the government which subjects the government to a loss of money only. Now, if the malefactor is fined in a sum greater than the duty which he should have paid, is not the government actually the gainer thereby? And is not such a punishment likely to deter future attempts to smuggle? On the other hand, a sentence to jail does not restore to the government one single penny out of which it has been defrauded. It would seem, therefore, that a fine is the best possible punishment that could be inflicted from the standpoint of an injured sovereignty. But, as between the wealthy and the poor malefactor, it is evident that the former can and will pay the fine, while the latter cannot, and therefore a jail sentence for the latter is the only remedy left open to the courts. This may or may not be the process of reasoning adopted by federal judges, heretofore, but nevertheless we throw it out as a mere suggestion of an argument that could be advanced in their behalf.

FEDERAL CONTROL OF DIVORCE.

FOR more than a hundred years the practical construction of the Constitution of the United States has been that the political, personal, social, and sexual status of the individual has been regulated by the laws of his environment; or to be specific, by State statutes and rules of law, as established by the judicatories of the several States of the Union. While with certain doctrinaires this has met with objection, on the whole it has proved to be a workable system in which each individual is amenable to well-recognized and generally easily ascertainable local requirements; in some instances these have been designated "police powers" of the State. It has been supposed that the unanimous course of decision in the Supreme Court of the United States to the effect that the federal government had no police powers, and no common-law powers, was not now open to question.

Therefore it seems at first sight that any attempt to change existing law as to divorce must proceed from the State; and, as Mr. Taft has pointed out in some of his recent speeches, to be effective must be uniform within the several States.

Any hope of uniformity in this behalf amongst the several States of the Union may as well be abandoned at once. The views entertained in the several localities are antagonistic and hopelessly irreconcilable. In South Carolina no divorce is permitted, upon any ground, by judicial act. It is true that, as the writer is informed, acts of the legislature have occasionally authorized such proceedings, or avoided the contract; but it seems at first sight a clear impairment of the obligation of a contract to set it aside without judicial inquiry. In any event an act of nullity, inherited from the English Parliament having absolute power, is abhorrent to common justice on many grounds; we need only refer to the practical denial of divorce to the poor, because of the expense attendant upon such a procedure, and to the use of political influence to procure an act for which no just cause exists. On the other extreme lie some of the States which recognize almost everything from good manners to murder as a ground of divorce.

For the specific defect to which Mr. Taft has called attention and which has been discussed in view of the remarriage of Mr. Astor in defiance of the prohibition of a court of the State of New York, it does not seem to be

necessary to resort to State legislation at all. An Act of Congress substantially to the effect of that in the margin appears to be competent to correct that specific difficulty.[1]

The Constitution of the United States, Article IV., section 1, provides:

SECTION 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Although there have been a number of decisions based upon this section, none of them weaken its effect or attempt to provide ways by which it may be evaded. On the contrary, the decisions of Justice Story and Chief Justice Marshall describe its effect in simple language, easily comprehended, and the judgments of courts of competent jurisdiction of the subject-matter and of the parties have always been given full force and effect; while those judgments, where there was a defect of jurisdiction, have been given no force and effect outside of the jurisdiction in which they were rendered. From the first the acquisition of personal jurisdiction in any other way than by personal service of process within the jurisdiction uniformly has been denied.

In spite of the difference between a libel of divorce, which is in some respects *in rem,* and other cases, such as civil litigation affecting property rights, or criminal cases, it does not differ in principle from other judicial proceedings. In fact, the various attempts to establish such differences have often been the cause of the troubles which have arisen in this branch of the law.

Most of the provisions of statute, particularly the Act of 1790 passed under the power granted to Congress by the constitutional provision above cited, have referred to the methods of proof; but it seems that under the last clause of the provision the Congress has the right to establish not only the manner of proof, but "the effect thereof." Grammatically this refers to the "acts, records, and proceedings," and not to the proof; it refers to their effect when proved, and not to the mere effect of the proof itself.

The writer considers the provisions in divorce decrees to which the President alluded debatable; they are at the present time practically incapable of being enforced, and no court should pass a decree which it cannot enforce, because that brings the administration of justice into contempt. So much of the objection to such a decree may perhaps be met by legislation of the class herein proposed, though not necessarily advocated.

There is, however, a broader objection to all such restrictions, and one which no legislation can ever obviate; that is, that they are a direct encouragement to immorality and illicit relations. In the case of a wealthy man of bad character, they amount to the purchase of one or more mistresses with the definite knowledge that he is protected from the usual blackmailing litigation attending meretricious relations, *by the decree,* of which the women as well as the rest of the public are bound to take notice.

It is unfortunately a fact that changes in the law, though difficult enough, are more easily made than understood, and it is not uncommon for them to have effects entirely unforeseen by those who advocate them. In dealing with the sexual attraction it should be borne in mind that it is based on a law of nature, and any attempt to regulate it can only be successful upon the broadest lines. Statutes and rules of court can make no one chaste, honest, or temperate, in the broadest sense. While we should and indeed must punish derelictions, this ought to be accomplished by the specific commands of the criminal law, and any proposition to enjoin future crimes has always been looked upon as preposterous and academic; for if one will not obey a law, he will not obey an injunction. Self-control in personal and private affairs is a matter of moral and religious training. The fact is, as Mr. Justice Stephen long ago remarked about the Statute of Frauds, as quoted in LAW NOTES:

"The power of law to control conduct is small, and is constantly exaggerated. Laws ought to be adjusted to the habits of society and not to aim at remoulding them. The cases in which any law is actually enforced are infinitesimally small in number in comparison with those in which it has no effect whatever."

An example of the unanticipated result of legislation along these lines is the act of the New York legislature making adultery a crime. Its unexpected effect was to make it impossible to put the guilty parties upon the stand in divorce cases; and so, except in case of a long-continued and flagrant case of misconduct, the difficulty of proof, even where moral certainty exists, is wellnigh insuperable.

Public hearings upon proposed statutory provisions are very seldom effective in making their scope plain or their language precise; if the participants approve or disapprove the legislation they say so, but they are seldom competent to criticise the language, so that it is nearly always taken for granted that what the proponents desire to accomplish will be effected if the proposed act be passed. How uncertain this is, every lawyer knows. Though outside the scope of this note, the writer ventures to suggest that the employment of parliamentary counsel permanently retained and not engaged in private practice, whose sole duty would be to advise as to the scope of proposed legislation with reference to existing law, and with regard to the meaning of the language employed, without regard to the merits of the proposal (such as has been for years the custom in England), would probably greatly diminish the amount of amendatory legislation and the difficulties which the courts have in interpreting ungrammatical, confused,

[1] SECTION 1. Where any court having jurisdiction of the parties and of the subject-matter shall enter a decree of divorce, and shall include therein a prohibition of remarriage of either or both of the parties, either generally or until the further order of the court, any attempted marriage in violation of such decree shall be void within the United States and all countries subject to their jurisdiction.

SECTION 2. If any attempted contract of remarriage be entered into in violation of such a decree within the United States, or in any country subject to their jurisdiction, the person named in the decree who shall take part therein shall be guilty of a felony, and shall upon conviction thereof be confined at hard labor or otherwise, in the discretion of the court, for not less than one nor more than ten years; or may be fined not more than five thousand dollars; or may be both imprisoned and fined.

SECTION 3. Any contract, antenuptial or postnuptial, by way of settlement or provision for wife, husband, and (or) children, made in contemplation or by reason of such attempted remarriage, whether directly or by way of trustees, shall be void. Any sum or sums paid or secured thereunder may be recovered by the heirs, or in default of heirs by the next of kin, of the payor, and any conveyance or security for performance shall be set aside upon their suit, any statute of limitations to the contrary notwithstanding.

and redundant acts of Congress or of legislatures. Of the probability of obtaining a suitable person, or of his retention after the first change in control of the legislature, though permanence is essential, our readers can judge.

T. J. JOHNSTON.

(It would seem at first sight impossible to construe the Interstate Commerce clause of the Constitution to extend to sexual relations; yet the Congress has attempted it, in the Act of June 25, 1910, c. 395, 36 Stat. L. 825. See U. S. *v.* Warner, 188 Fed. 682.)

A WASHINGTON DECISION ON THE CONSTITUTIONALITY OF WORKMEN'S COMPENSATION ACTS.

THE constitutionality of workmen's compensation acts making employers of labor in certain enumerated dangerous occupations liable for injuries to their employees whether or not the injuries result from any fault of the employers has been already passed on in three States — New York, Washington, and Wisconsin. Some months ago a considerable portion of these columns was given up to a consideration of *Ives* v. *South Buffalo R. Co.*, 201 N. Y. 271, which held that the New York act was unconstitutional because it imposed upon an employer who had omitted no legal duty and had committed no wrong, a liability based solely upon a legislative determination that his business was inherently dangerous, and therefore subjected an employer to a deprivation of his liberty and property without due process of law, and without the justification that such deprivation tended to preserve the public health, morals, safety, and welfare of the people. Judge Werner, who wrote the opinion of the court in that case, made the following sound observations: "The right of property rests not upon philosophical or scientific speculations nor upon the commendable impulses of benevolence or charity, nor yet upon the dictates of natural justice. The right has its foundation in the fundamental law. That can be changed by the people, but not by legislatures. In a government like ours theories of public good or necessity are often so plausible or sound as to command popular approval, but courts are not permitted to forget that the law is the only chart by which the ship of state is to be guided. Law as used in this sense means the basic law and not the very act of legislation which deprives the citizen of his rights, privileges, or property. Any other view would lead to the absurdity that the constitutions protect only those rights which the legislatures do not take away. If such economic and sociologic arguments as are here advanced in support of this statute can be allowed to subvert the fundamental idea of property, then there is no private right entirely safe, because there is no limitation upon the absolute discretion of legislatures, and the guarantees of the constitution are a mere waste of words." Notwithstanding the holding of the New York court in this case, a similar act passed in Wisconsin has, within a few days, been declared constitutional by the Supreme Court of that State, but the report of the case is unfortunately not at hand. Moreover the Supreme Court of Washington has recently refused in the case of *State* v. *Clausen*, 117 Pac. 1101, to follow the holding of the New York court, in passing on the Workmen's Compensation Act of Washington, notwithstanding that the Washington act, while it varies in many respects from the New York act, is based on the radical and fundamental idea common to both that an employer should be compelled to compensate an employee who is injured in an occupation declared by the legislature to be dangerous, irrespective of whether the employer could have foreseen the injury and guarded against it.

The Workmen's Compensation Act of Washington starts out with a declaration of the policy of the act. It recites that the common-law system governing remedies of workmen against employers for injuries received in hazardous employments are inconsistent with modern industrial conditions; that in practice such remedies have proven economically unwise and unfair; that their administration has produced the result that little of the cost thereof to the employer has reached the workmen, and that little, only at a great expense to the public; that the remedy to the individual workman is uncertain, slow, and inadequate; that injuries in such employments, formerly occasional, have become frequent and inevitable; that the welfare of the State depends upon its industries, and even more upon the welfare of its wage workers. And it thereupon declares that the State of Washington, exercising its sovereign powers, withdraws all phases of the premises from private controversies and provides sure and certain relief for workmen injured in extrahazardous work, and their families and dependents, regardless of questions of fault, to the exclusion of "every other remedy, proceeding, or compensation, except as otherwise provided in this act." It thereupon abolishes civil actions and civil causes of action for personal injuries incurred in extrahazardous employments, and the jurisdiction of the courts thereon, except as in the act provided.

The Washington act is very long, but the salient features of the act as they appear in the opinion of the court are as follows: Section 2 enumerates what the legislature deems extrahazardous employments. Section 3 defines certain of the words and terms used in the act. Section 4 contains a schedule of contributions. It recites that, in so much as industry should bear the greater proportion of the burden of the costs of its accidents, each employer shall, prior to January 15th of each year, pay into the State treasury, in accordance with a schedule provided, a sum equal to a percentage of his total pay roll of that year. Then follows a classification of the different industries and the rate per centum each several class shall be required to pay; the amounts varying as the legislature deemed the risk of injury therefrom varied, and the greater hazard contributing the larger percentage. The fund created is termed the "accident fund," and it is provided that it shall be devoted exclusively to the purposes specified in the act. Section 5 contains the compensation schedule. It provides that each workman who shall be injured, whether upon the premises or at the plant or being in the course of his employment away from the plant of his employer, or his family or dependents in case of the death of the workman, shall receive out of the accident fund compensation in accordance with the schedule provided, and except as in the act otherwise provided such compensation shall be in lieu of any and all rights of action whatsoever against any person whomsoever. Section 6 relates to intentional injuries and the status of minors engaged in hazardous employments. It is provided that, if injury or death results to a workman from the deliberate intention of the workman himself to produce such injury or death,

no compensation shall be made either to the workman or his dependents out of the accident fund. Section 11 provides that no employer of workmen shall exempt himself from the burden or waive the benefits of the act by any contract, agreement, rule, or regulation, and that any such contract, agreement, rule, or regulation shall be *pro tanto* void. Section 20 relates to court reviews. It provides that any employer, workman, beneficiary, or person feeling aggrieved at any decision of the department created to administer the terms of the act affecting his interest may have the same reviewed by a proceeding. Section 21 vests the administration of the act in a department to be known as the "Industrial Insurance Department," to consist of three commissioners to be appointed by the governor. There are other important provisions of the act, but lack of space forbids a consideration of them.

The Workmen's Compensation Act of Washington was attacked on four grounds: (1) That it violated section 3 of article 1 of the State constitution, and the Fourteenth Amendment to the Constitution of the United States, which provide that no person shall be deprived of life, liberty, or property without due process of law; (2) that it violated section 12 of article 1 of the State constitution, which provides that no law shall be passed granting to any citizen, class of citizens, or corporations, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations; and the Fourteenth Amendment to the Constitution of the United States, which provides for the equal protection of the laws; (3) that it violated sections 1 and 2 of article 7 of the State constitution, which provide that property shall be taxed according to its value in money and that all taxation shall be equal and uniform; and (4) that it violated section 21 of article 1 of the State constitution, which provides that the right to trial by jury shall remain inviolate. None of these grounds was sustained.

Considering the reasons why the Workmen's Compensation Act of Washington should be declared constitutional the Washington Supreme Court said: "If the act in controversy has a reasonable relation to the protection of the public health, morals, safety, or welfare, it is not to be set aside because it may incidentally deprive some person of his property without fault or take the property of one person to pay the obligations of another. To be fatally defective in these respects, the regulation must be so utterly unreasonable and so extravagant in nature and purpose as to capriciously interfere with and destroy private rights. That the statute here in question has the attribute of reasonableness, rather than that of capriciousness, seems incontrovertible. The evil it seeks to remedy is one that calls loudly for action. Accidents to workmen engaged in the industries enumerated in it are all but inevitable. It seems that no matter how carefully laws for the prevention of accidents in such industries may be framed, or how rigidly they may be enforced, there is an element of human equation that enters into the problem which cannot be eliminated and which invariably causes personal injuries and consequent financial losses to workmen engaged therein. Heretofore these losses have been borne by the injured workmen themselves, by their dependents, or by the State at large. It was the belief of the legislature that they should be borne by the industries causing them, or, perhaps more accurately, by the consumers of the products of such industries. That the principle thus sought to be put into effect is economically, sociologically, and morally sound, we think must be conceded. It is so treated by the learned counsel who have filed briefs in support of the auditor's contentions; it is so conceded by all modern statesmen, jurists, and economic writers who have voiced their opinion on the subject; and the principle has been enacted into law by nearly all of the civilized countries of Europe, by Australia, by New Zealand, by the Transvaal, by the principal provinces of the Dominion of Canada, and in a partial form at least by one or more of the South American republics. Indeed, so universal is the sentiment that to assert to the contrary is to turn the face against the enlightened opinion of mankind. The common law does not purport to afford a remedy for the condition here found to exist. It affords relief to an injured workman in only a limited number of cases — cases where the injury is the result of fault on the part of the employer and there is want of fault on the part of the workman. For the greater number of injuries traceable to the dangers incident to industry, no remedy at all is afforded. The act, therefore, having in its support these economic and moral considerations, is not unconstitutional for the reasons suggested upon this branch of the argument." On the novel question of whether the act was unconstitutional as interfering with the right of trial by jury the court said: "It is said that the legislature cannot fix a Procrustean rule for the admeasurement of damages arising from injuries received by one in the employment of another, as the employer and the employee alike have the right to submit to a jury both the question of the right to recover for any such injury, and the question of the amount that may be recovered therefor. But we cannot think the rule absolute. It may be that the legislature cannot fix the amount of recovery or provide for an absolute recovery, in all cases where one person is injured by another, regardless of the relation of the parties, or the question whether the injury is or is not the result of negligence; but it does not follow that it may not so provide where the injury happens in that class of employments subject to legislative regulation and control. If it be, as we have attempted to show, a proper regulation of hazardous industries to compel those engaged therein as owners or operators to pay a fixed sum into a fund to be used for the purpose of compensating the employees thereof for injuries received by them, it is difficult to understand why it is not also proper regulation to require the employees of such industries to accept a given sum for any injury they may receive while so engaged. The same power that authorizes the State to regulate the participation of the one in the particular industry would seem to authorize it to regulate the participation of the other therein." The court in passing on the argument of counsel that the decision of the New York court, in *Ives v. South Buffalo R. Co.*, was conclusive of the question at bar said: "The act the court there had in review is dissimilar in many respects to the act before us, and is perhaps less easily defended on economic grounds. The principle embodied in the statutes is, however, the same, and it must be conceded that the case is direct authority against the position we have here taken. We shall offer no criticism of the opinion. We will only say that notwithstanding the decision comes from the highest court of the first State of the Union, and is supported by a most persuasive argument, we have not been able to yield our consent to the view there taken."

THE LIABILITY OF THE AVIATOR.

A FLEDGLING birdman on October 16th last, giving heed to the impulse of the hour, trundled his aeroplane out of its hangar and mounted skyward. He gleefully skimmed the neighboring fields, circled a building of the Young Women's Christian Association, just to show off to the occupants, and looked about for other earthly beings on whom he might make an impression. On he went until finally he found himself over a gentleman's country estate. Below stretched fields and woodland and the owner's golf course. On one of the greens he perceived a horse, which was being employed to cut the grass. What happened next is told by a newspaper of the day as follows: He "made the horse a target. He swooped down. Just before the machine reached the ground the horse looked around. All horses have been nervous for the last ten years. First the automobile and then the flying machine contributed to bring about this condition. This horse had the heart of any other horse. He neighed loudly, leaped into the air, and fell dead. A veterinarian said afterwards that the horse was literally scared to death."

Assuming that the above statement of the facts is accurate, let us consider what liability, if any, was incurred by this aviator. Such an inquiry should be interesting and instructive to the rapidly increasing number of birdmen. Some day soon such a case as the one above set forth is going to result in some real law on the subject; until then any of us may hazard a guess as to the rights of the parties. In considering this case a number of questions arise: Primarily, Did the aviator (defendant) have a right to fly over the estate of the horse-owner (plaintiff)? If so, had he a right to manœuvre thereover? And had he a right voluntarily to direct his aeroplane in close proximity to the plaintiff's horse? Evidently he thought he had a right to do any or all of these things. Perhaps this is a popular belief among aviators. If so, it is submitted that the impression is erroneous.

It may be conceded that the defendant had a right to fly over the land of the plaintiff, even if he was proceeding for pleasure only. A number of reasons suggest themselves in favor of such a right. It is impractical to deny it. To do so is to interfere with progress in a science that may be of great value to mankind. Nor is there any basis for an action by a landowner against an aviator for merely passing over the former's land. "Trespass or any other foundation of legal liability proceeds upon an assumption that an injury has been done. To set foot upon another's land without his license to do so is a trespass, although the damage amounts to practically nothing; yet there is some damage — the soil is trodden down or the grass bruised. The momentary occupation of space above land, suspended upon air which is itself as fugitive as the aeronaut, is quite another matter. The absence of injury is the practical consideration, and should outweigh any others in determining what the rule of law shall be." [1]

Furthermore there has been a popular recognition of the right of strangers to use temporarily the space superjacent to private property. "No one has ever questioned the right of a person to have his fowls fly over his neighbor's land. Nor has it ever been contended that the passing of the smoke from A's chimney across B's land amounts to a trespass (though it may be a nuisance) upon B's property rights. The use of space appurtenant to land for the passage of wireless messages is a similar case. And in the century and a quarter that man has been able to navigate the air, first by balloons and lately by aeroplanes, there has been no contestation of the right of aeronauts to pass over private land. At many aviation exhibitions the aviators have passed repeatedly over lands of individuals, asserting apparently a right to do so. This continued use of private space demonstrates very clearly a popular understanding and agreement that there exists a right of passage." [2]

The according of a right of passage to aviators does not deny the landowner's title to the space over his land. "The air domain of a proprietor may be utilized by him to any extent, but in so far as he has not appropriated it, it must be deemed to be subject to a servitude of passage by aviators. The case is analogous to that of the highway, upon which the public have a right of passage, while the fee remains in the owner of the abutting land." [3]

The defendant in the horse-frightened-to-death case had a right, then, to fly over the plaintiff's land. He did not content himself, however, with merely passing across the property; he loafed about in the plaintiff's air(ea) without any necessity therefor. This he should not have done. "The moment an aviator ceases to be a passerby, he risks becoming a wrongdoer. He may occupy another's space temporarily, but he must not do so longer than is reasonably necessary for passage. The presence of aerovehicles above the land is more or less of a menace to life, buildings, crops, etc. The law recognizes the risk and concedes the right of passage nevertheless; but it does not permit any increase in the risk by reason of a stoppage, hovering, or the like. Such acts amount to a nuisance *per se*." [4]

And the defendant's act in voluntarily descending toward the horse was positively wrongful. He had no right to descend into close proximity to the plaintiff's golf course or any other portion of his estate, without permission. And he certainly had no right to fly near to the horse. He clearly is liable for the animal's death. "The height at which an aviator may lawfully pass over private property must vary according to the circumstances of the case. The criterion is the degree of peril or inconvenience to which the proprietor is subjected. Passing in close proximity to an ordinary city dwelling can cause little or no more inconvenience than does a motor vehicle or street car moving along the street. But passing over a man's lawn in the country, where he has sought seclusion and whereon his children are playing, is another matter. Again, flying so low as to cause fright to domestic animals doubtless renders the aviator liable for whatever damage may result." [5]

[1] Davids on Motor Vehicles, 292.

[2] Same, 295–296.

[3] Same, 292.

[4] Same, 296–297.

[5] Same, 297–298.

Cases of Interest.

NECESSITY OF PRESENCE OF PRISONER ON HEARING OF MOTION IN ARREST OF JUDGMENT OR FOR NEW TRIAL. — In Fleming *v.* State, (Fla.) 56 So. Rep. 298, it was held that a court might insist upon the personal presence of one found guilty of a felony, if practicable, upon the argument of a motion in arrest of judgment or for a new trial. The court said: "We may admit that there are adjudged cases and text-writers holding that the personal presence of the prisoner, even in felonies, is essential only from the arraignment to the verdict, and this court has held that it is not necessary that the record affirmatively show the personal presence upon the argument of the motion for a new trial; and yet with this admission we do not find that authorities hold that a court may not insist upon the personal presence, when practical, and there is nothing to indicate that there were difficulties in the way of having Fleming brought into court."

GROCER TAKING ORDERS FOR GOODS AND DELIVERING THEM BY WAGON AS "HAWKER." — In Scribner *v.* Mohr, (Neb.) 132 N. W. Rep. 734, the question in dispute was whether a grocer who took orders for goods, filled them at his store, and delivered them by wagon to customers in a neighboring village was a "hawker of goods by retail, by sample, or by taking orders or otherwise," so as to be within the provision of an ordinance of a village imposing a license tax on such hawkers. It was held that he was not, although it appeared that while some of the orders were by mail or telephone a few were taken by the driver of the wagon, there being no proof, however, that new customers were sought by the driver or that he ever asked for, solicited, or requested orders from any person. The court accepted as a correct definition of a "hawker" that given in Webster's New International Dictionary, which is as follows: "One who sells wares from place to place, or by crying them in the street."

LIABILITY OF COMMON CARRIER FOR DEATH OF PASSENGER CONTRACTING MEASLES FROM FELLOW PASSENGER. — In Bogard *v.* Illinois Cent. R. Co., (Ky.) 139 S. W. Rep. 855, it was held that a railroad company was not liable for the death of a passenger from measles contracted by him from a fellow passenger, there being no proof that the company, through the officers or servants in charge of the train, had any knowledge or notice that a passenger thereon was afflicted with a contagious disease. The court said: "It is insisted for appellant that appellee is responsible for the death of his son of measles contracted of the fellow passenger, if its conductor knew, or by the exercise of ordinary care could have known, of the fellow passenger's having the measles, in time to have prevented the decedent from contracting the disease; whereas, the jury were told by the two instructions in question that actual knowledge on the part of the conductor that such passenger had the measles was necessary, and that appellee was only liable for the failure of the conductor to use ordinary care to protect the decedent from contagion, after discovering that the fellow passenger had the disease. In our opinion the instructions correctly stated the law. No liability should be made to attach to a railroad company in a case like this, in the absence of proof that the officers or servants in charge of its train, upon which the person claiming to have been injured was being carried as a passenger, had some knowledge or notice that a passenger thereon was afflicted with a contagious disease, and then failed to promptly exercise ordinary care to prevent contagion to other passengers on the train, such as the circumstances would admit of, considering the duty of the railroad company, both to the passenger afflicted with the contagious disease and the passenger entitled to protection against contagion therefrom."

LIABILITY OF MUNICIPALITY FOR INJURIES TO PEDESTRIAN DUE TO FALLING OVER WIRE INCLOSING GRASSPLOT. — In City of Paducah *v.* Simmons, (Ky.) 130 S. W. Rep. 851, which was an appeal from a judgment for the plaintiff in an action against a municipality to recover damages for personal injuries, the following facts appeared in evidence: On a certain evening, between twilight and dark, the plaintiff, a man about twenty-two years of age, in attempting to cross a narrow grassplot between the sidewalk and the curbing, came in contact with a small wire, about a foot above the level of the grassplot, fastened to two stakes or posts, and stretched along the edge of the sidewalk and the grassplot, and was thrown on the concrete sidewalk. As a result of the fall his arm was broken, some of his teeth broken, his lip cut, and he was otherwise bruised. At the time he fell the plaintiff was walking rapidly and did not notice the small dark-colored wire. Indeed, it was doubtful if he could have discovered it if he had been carefully looking. On these facts it was held that the judgment of the lower court was proper, and it was affirmed. The court said: "Nor have we any doubt that the city was negligent in protecting this grassplot by the kind of wire over which appellee fell, located at the place it was. Of course, cities and towns have the right to save from injury and protect from travel by suitable barriers grassplots and other places intended for ornament and beauty, located on streets and public ways; but the barriers should be of such a character and so located as that travelers, in the exercise of ordinary care for their own safety, may have notice of their presence. A small wire, suspended as this one was, is about as dangerous an obstruction as could well be placed at a point where pedestrians have the right to use the street; and appellee had the right to walk across this grassplot, as he was doing when he stumbled over this wire."

EXPENSE OF TAKING PASTEUR TREATMENT AS PROPER ITEM OF DAMAGE IN ACTION FOR INJURIES INFLICTED BY VICIOUS DOG. — In Ayers *v.* Macoughtry, (Okla.) 117 Pac. Rep. 1088, which was an action to recover for injuries inflicted by a vicious dog, the plaintiff in his petition pleaded damages in the sum of $150, expenses incurred by him in traveling from Muskogee, Oklahoma, to Austin, Texas, to take the Pasteur treatment as a prevention of hydrophobia. The defendant answered, denying among other things the necessity of the above expenses. There was a verdict and judgment for the plaintiff, and the defendant appealed from the judgment on the ground, among other things, that the evidence taken at the trial did not disclose any necessity for the incurring of the above expenses. The judgment was affirmed, however, the court saying: "It is true that neither the local physician who treated him nor plaintiff himself testified that it was necessary that he take this treatment, but we submit that plaintiff was not required to wait until rabies developed before he took those reasonable, precautionary measures which any intelligent man would naturally take to relieve himself from the danger. Courts take judicial knowledge of the fact that smallpox is a terrible disease, whose ravages have sometimes swept away thousands of human beings in a few weeks. It is also known that a large number of the medical profession and people generally consider vaccination a preventive of the disease, and of these facts courts take judicial knowledge. . . . Likewise it is a matter of general knowledge that one of the most horrible forms in which death can visit humanity is that of hydrophobia, and that this is incurred by being bitten by dogs which have it. The wounds in this case were inflicted in August, and everybody, even courts, take knowledge of the fact that any precaution which could be said to be advisable would, in view of the consequences which its omission might entail, be deemed to be reasonable and necessary. Knowledge that the Pasteur treatment is generally considered proper for the prevention of rabies or hydrophobia may be considered to be judicially known, without proof thereof; and a consideration of plaintiff's injuries and of the possible results, taken in connection with the issue made and the evidence introduced, are sufficient, in our judgment, to support the conclusion that the expenses incurred in taking the same were reasonable and necessary."

NATURE OF AGREEMENT PERMITTING ERECTION AND USE OF BILLBOARDS ON REAL PROPERTY. — In Borough Bill Posting Co. *v.* Levy, 144 N. Y. App. Div. 784, the court had under construction the following agreement: "In consideration of a yearly rental of ten dollars, the undersigned, owner of lots located at Eastern Parkway and Truxton street, east side of boulevard, borough of Brooklyn, city of New York, hereby leases to the Borough Bill Posting Company, Brooklyn, N. Y., the exclusive privilege of erecting and using fence or signboard to be located on said lots for bill posting purposes; the owner reserving the right, in case said property is sold or

required for building purposes, to cancel all privileges upon returning to the company a *pro rata* amount of said yearly rent; all fences or signboards erected by the company remain its property, and it has the right to remove the same at the expiration of this lease. Privilege of renewal is also given upon the same terms. Privilege to place sign on top of fence to owner." It was held that this agreement created not a license or a lease, but an easement in gross for one year; that it was irrevocable during that period; and that the owner who had neither sold the land nor required it for building purposes would be enjoined from removing billboards erected by the owner of the easement and from interfering with his use thereof. The court said: "It is apparent that the parties contemplated, the one to grant and the other to receive, a privilege which was to be continued for a definite period, to wit, one year, with a right of renewal, unless this privilege, which is not only specific but exclusive in its character and authorizes the Borough Bill Posting Company not only to make use of the fence or signboards to be located on the property therein described, but permits also the erection of other fences and signboards by it on said premises, which should remain its property and which it should have the right to remove at the expiration of the period, and it necessarily involves the right to go upon the premises in question to accomplish each of these purposes. We think, therefore, that this is more than a license; that it is an easement; and there being no dominant estate to which the easement might attach, it is an easement personal in its character, or, as it is sometimes called, an easement in gross. Although such an easement is a personal privilege, it is more than a revocable license. It confers an interest in the servient tenement which is at least an equitable charge or burden in favor of the grantee."

CONSTITUTIONALITY OF STATUTE REQUIRING PHYSICAL EXAMINATION OF PROSTITUTES. — In Barone *v.* Fox, 144 N. Y. App. Div. 611, it was held that a statute which provided for the physical examination of women adjudged guilty of being common prostitutes, and their commitment to a public hospital if found to be afflicted with any communicable venereal disease, was designed for the protection of the public health and was a justifiable exercise of the police power. With respect to a contention that the statute required that a committing magistrate must accept the report of the physician making the examination as to whether a person adjudged to be a prostitute had a communicable venereal disease, and therefore that it prevented a judicial determination of this question, the court said: "The statute provides that after such a physical examination the physician making the same shall promptly prepare and sign a written report to the court of the prisoner's physical condition, and if it thereby appears that the prisoner is afflicted with any venereal disease which is contagious, infectious, or communicable, the magistrate shall commit her to a public hospital having a ward or wards for the treatment of the disease with which she is afflicted, for detention and treatment for a minimum period fixed by him in the commitment and for a maximum period of not more than one year. There is nothing in this statute which in terms makes the report of a physician binding upon a magistrate, and nothing which prevents a magistrate from hearing testimony as to the prisoner's condition or from determining the question as to her condition contrary to the report of the physician. It does not appear that the relator denied that she was suffering from such a disease, or asked to have that fact further investigated or that she be allowed to prove that she was not afflicted with such a disease. It is true that the mandatory word 'shall' is used rather than the permissive word 'may' or 'has authority to' commit the relator. But the instances are many in which courts have treated the mandatory word as merely permissive when necessary to sustain an act or accomplish the purpose which was clearly intended. Considering all the provisions of this article of the statute, it seems to me that the provisions of section 79 were provisions for the health of the community and were intended to ameliorate the condition of one suffering from one of the most terrible diseases and to protect the community from infection. There is no provision that took away from the court its inherent power to determine a question of fact upon which it was required to act, or prevented the court, if requested by the relator, from questioning the truth of the report of the physician, or from taking further testimony or investigating the correctness of the report and determining for itself the existence of the disease which justified detention in a hospital rather than in a public institution."

RIGHT OF PUBLIC SERVICE CORPORATION TO DISCRIMINATE IN FAVOR OF CERTAIN CLASSES. — In New York Telephone Co. *v.* Siegel-Cooper Co., 202 N. Y. 503, it was held that a telephone company with an exclusive right to use the streets of the city of New York in order to carry on its business, might make a discount of twenty-five per cent. from its usual charges for telephone service, in favor of the city itself, regularly incorporated charitable institutions, and regularly ordained clergymen, without entitling all its other patrons to a like discount for service of the same kind. The court said: "The common law upon the subject is founded on public policy, which requires one engaged in a public calling to charge a reasonable and uniform price to all persons for the same services rendered under the same circumstances. Special contracts are not absolutely forbidden, for rates may vary as conditions change, but there can be no discrimination without a reasonable basis therefor. The rule requires reasonable and impartial charges to all, but the exception permits a reduction when special facts make it reasonable and just. The rate charged must not only be reasonable but uniform, so that all are treated alike under like circumstances. There can be no favoritism, no arbitrary reduction in favor of a particular customer, and no undue advantage to one person through undue disadvantage to another, but discriminations founded on reason and justice may be made. Whether a discrimination is unreasonable or not is usually a question of fact, but the parties in this case have made no stipulation on that subject in their statement of the facts, and we cannot find a fact even if we think that the facts as agreed upon would permit the inference. The defense, therefore, must fail, regardless of any other consideration, unless we hold that one or more of the discriminations in question was unreasonable as a matter of law. No discrimination was made by the plaintiff in favor of any class of customers except the three expressly named, and for time out of mind discounts have been allowed by common carriers and others conducting a business in which the public has an interest, for services rendered to clergymen and institutions of charity, because they are engaged in the work of benefiting mankind and are supported by contributions from the public. For these reasons their property is exempt from taxation wholly or in part. They carry on no business, do not compete with others, and are not engaged in making money. It is the general belief that they render full value for what they receive by caring for the sick and wounded, or helping all to lead orderly lives. . . . Moreover, the law against unreasonable discrimination rests on public policy. It is forbidden because it is opposed to the interest of the public, which requires that all should be treated alike under like circumstances. Discriminations, however, in favor of the public are not opposed to public policy, because they benefit the people generally by relieving them of part of their burdens. In the absence of legislation upon the subject such discriminations

cannot be held illegal as matter of law without overturning the foundation upon which the rule itself is built."

TRUNK IN POSSESSION OF TRANSFER COMPANY AS "BAGGAGE." — In Morgan *v.* Woolverton, 203 N. Y. 52, it appeared that the plaintiff was a passenger on a train coming into New York city and that the defendant was engaged in the business of taking from the railroad company the baggage of passengers and delivering it at their homes or other designated points in the city of New York. Before the train reached New York the defendant's agent received from the plaintiff her railroad check for a trunk to be delivered in New York city and gave her a receipt or check therefor. The trunk was received from the railroad company but somehow was lost or miscarried. It was held that the defendant was liable for the full value of the trunk and its contents, amounting to something over $1,200, the trunk not being "baggage" within the meaning of the Public Service Commission Law of New York, limiting the liability of a common carrier for baggage carried by it unless the value in excess of $150 shall be stated upon delivery to the carrier. The court said: "Baggage has been defined in the dictionary as 'trunks, . . . etc., which a traveler carries with him on a journey,' and a great volume of decisions and text law has fixed the status of baggage or articles 'carried as baggage' as that of property which is transported under or as an incident to the contract of transportation of the owner as a passenger. Under the principles which have been thus abundantly established we do not define as 'baggage' in a proper sense property which is being moved by express or otherwise apart from and disconnected with the transportation of the person who owns the same, even though it be a trunk. The origin and purpose of the section in question almost conclusively indicates that its application is to property carried in connection with the owner. The earlier rule of liability had been built up that the carrier, generally speaking, was only liable for such property as baggage as was appropriate to the journey being taken by its owner, indicating clearly an essential relation of baggage to the transportation of the person who owned it. The section now before us did not in the least impair this fundamental idea. It did not change the conditions under which property might become baggage, but, in full recognition of them, simply enlarged conditionally the limitations upon the value and kind of property which might be brought within this classification. Thus it seems very clear that the terms of this statute take into account the conditions under which property is carried, quite as much as the primary character of the property, and that these conditions must establish a certain transportation relationship between it and its owner to make it baggage. If this interpretation is correct it is equally clear that the provisions do not apply to this case. Appellant did not undertake to transport respondent and incidentally her trunk. Its contract for the delivery of the latter did not take effect until that for the transportation of the owner even on the railroad had come to an end. It related exclusively to the movement of property presumably in consideration of a sum paid solely and specifically for that purpose. In this case it related to the carriage of a trunk from the railroad station to some other point, but so far as this question is concerned, it might as well have related to the carriage of a box between houses, and there is entirely wanting that character and those conditions of transportation which enter as essential elements into the definition of baggage and of property carried as such."

RIGHT TO RECOVER DAMAGES FOR UNLAWFUL INTERFERENCE WITH TRADE. — In Dunshee *v.* Standard Oil Co., (Ia.) 132 N. W. Rep. 371, which was an action for damages for an unlawful interference with trade, it appeared from the evidence taken at the time that during all the period covered by the controversy the Standard Oil Company was a wholesale dealer in oil at the city of Des Moines. In the year 1893 the Crystal Oil Company (plaintiff's assignor), a local corporation, entered the retail trade in oil, selling its goods from tank wagons hauled about the streets, and delivered to its customers at their homes. Its business grew from year to year until, in 1898, it employed from four to eight wagons, covering the territory of the city very generally. During the period mentioned, the Crystal Company purchased its supplies from the defendant, but in 1898 it for some reason began to make purchases from other wholesale dealers. Trouble at once ensued. The defendant, which, up to that time, had abstained from the retail trade, proceeded to equip itself with tank wagons, teams, and drivers, substantially equal in number to those of the Crystal Company, and began active solicitation for the patronage of the ultimate consumer. At the end of some months of strife the Crystal Company abandoned the contest and quit the business at a loss, claiming to have been driven out by the tactics of its rival. The case as made by the plaintiff tended strongly to show that defendant installed its scheme of retail distribution of oil in the city of Des Moines, not for the purpose of establishing a retail trade, but as a mere temporary expedient to drive out the Crystal Company, and that this being accomplished, and having the field to itself, it withdrew its wagons and drivers and gave its whole attention to its wholesale business. In the prosecution of its business the Crystal Company was accustomed to supply its customers with cards to be displayed from a window or other conspicuous place, indicating a desire to purchase oil and inviting the distributor to stop and furnish the needed supply. The evidence tended to show that when the Standard entered the field its drivers were directed to give special attention to the Crystal Company's "green cards," and that, at the outset at least, there was little or no attempt to build up a retail trade with the public generally, but to take away or destroy the trade of the Crystal Company. Some of the witnesses said the Standard's drivers would make it a point to get in advance of the Crystal's wagons, and wherever a green card was displayed would stop and make the sale if possible, sometimes permitting the buyer to suppose that he or she was dealing with a Crystal agent, and in other cases appropriating or carrying away the Crystal's cards. The Standard's hand in these efforts was not disclosed to the public. The drivers were instructed to do business ostensibly as independent dealers driving their own wagons, none of which were marked with the Standard's name, though in fact the outfits were furnished and all expenses paid by it, and the entire business was carried on under the secret management of its agent, who held frequent meetings with the drivers, urging them to "go after the green cards," to "hustle the green cards," to "go after the Crystal Oil Company," and at the same time cautioned them to "keep quiet" about the real ownership and management. It was further testified that when the Crystal Company had been eliminated the manager in charge had a final meeting of the drivers at his residence, where he said: "The fight is over, and we have bought them out." Plaintiff also showed that defendant's movement in the matter followed closely upon the Crystal Company's exercise of its right to purchase part of its oil from another dealer, and its refusal to yield to the Standard's insistence that it wanted "all or none" of the Crystal's trade. There was a judgment for the plaintiff in the trial court, and on appeal it was held that the record as a whole was sufficient to justify the inference that the real end sought to be accomplished was to bar or exclude from the retail trade one who would not give the Standard Company, as a wholesale dealer, its exclusive patronage, and that this conduct entitled the plaintiff to damages. The judgment below was reversed, however, and a new trial was granted for certain erroneous instructions of the trial judge

not going to the right of action. A pertinent part of the court's opinion was as follows: "We may concede to the appellants the undoubted right to establish a retail oil business in Des Moines, to employ agents and drivers, and send them out over the same routes and make sales to the same people with whom the Crystal Oil Company was dealing; but in so doing it was bound to conduct such business with reasonable regard and consideration for the equal right of the Crystal Company to continue supplying oil to such of its customers as desired to remain with it. If, however, there was no real purpose or desire to establish a competing business, but, under the guise or pretense of competition, to accomplish a malicious purpose to ruin the Crystal Company or drive it out of business, intending themselves to retire therefrom when their end had been secured, then they can claim no immunity under the rules of law which recognize and protect competition between dealers in the same line of business seeking in good faith the patronage of the same people. And if, under such pretense of competition, defendants maliciously interfered with the business of the Crystal Oil Company in the manner charged, and injury to the latter was thereby inflicted, a right of action exists for the recovery of damages. It may be conceded that authorities are not wanting to sustain the position that, even though the Standard Oil Company had no intention of becoming a retail dealer in oil in Des Moines, but entered the business of selling oil in this manner temporarily, for the sole purpose of driving the Crystal Company out, it is a matter into which the courts will not inquire; but we think such precedents are out of harmony with fundamental principles of justice, which, as we have said, underlie the law, as well as out of harmony with the later and better-considered cases."

News of the Profession.

THE COLORADO BAR ASSOCIATION has decided to test, by quo warranto proceedings, the validity of the newly created Court of Appeals of that State.

APPOINTED TO ILLINOIS APPELLATE COURT. — Judge Morton W. Thompson of Danville has been appointed a member of the Illinois Appellate Court.

THE CALIFORNIA STATE BAR ASSOCIATION held its annual meeting on Nov. 13, 14, and 15, at Sacramento, Cal. Further particulars will be given in our next issue.

DEATH OF DISTINGUISHED LOUISIANA JUDGE. — Judge Charles E. Fenner, a distinguished lawyer, educator, and citizen, died at New Orleans, La., on Oct. 24.

CHOATE GOLDEN WEDDING. — Former Ambassador and Mrs. Joseph H. Choate celebrated their golden wedding on Oct. 16, at their summer home in Stockbridge, Mass.

THE IOWA STATE BAR ASSOCIATION has selected Cedar Rapids, Ia., as the place for the next annual meeting, which will be held on the last Thursday and Friday in June, 1912.

AN AMERICAN LAW OFFICE IN BERLIN. — Professor C. H. Hubenich, of the school of law of the Leland Stamford Junior University, has recently opened law offices No. 39 Unter den Linden, Berlin, Germany.

NEW TEXAS JUDGE. — E. D. Mayes of Floresville, Tex., has been appointed by the commissioners of Wilson county to fill the vacancy in the office of county judge caused by the death of Judge H. B. Gouger.

ALABAMA JUDGE APPOINTED. — Judge Samuel E. Green, formerly judge of the Criminal Court of Birmingham, Ala., Circuit Court judge and probate judge, has been appointed by Governor O'Neal to succeed the late Samuel L. Weaver as judge of the Criminal Court.

RESIGNATION OF FEDERAL JUDGE IN MONTANA. — The resignation of Hon. Carl Rasch of Helena as judge of the United States court for the district of Montana took effect on Oct. 13. Judge Rasch retired from the office of judge to take up private practice.

UNIVERSAL PEACE CONVENTION. — The annual meeting of the American Society for the Judicial Settlement of International Disputes was held in Cincinnati, O., on Nov. 7 and 8. President Taft, honorary president of the society, delivered the principal address.

GEORGIA JUDICIAL APPOINTMENT. — Governor Smith of Georgia has named Hon. H. Warner Hill as associate justice of the Supreme Court of that State, to succeed Justice Holden, resigned. Mr. Hill is a grandson of the late Hiram Warner, chief justice of the Georgia Supreme Court.

AGED POLICE JUDGE RESIGNS. — Judge Samuel P. Hadley of the Lowell (Mass.) Police Court resigned his office on Oct. 19. Judge Hadley is eighty years of age and has been connected with the Lowell Police Court for the past fifty-four years, serving as clerk for twenty-eight years and presiding judge for twenty-six years.

THE EXECUTIVE COMMITTEE OF THE COMMERCIAL LAW LEAGUE OF AMERICA held an important meeting in Philadelphia on Nov. 20. Besides the nine members of the committee, a large number of ex-presidents and leading members of the league were present. Elaborate plans were made for the nineteenth annual convention of the league, to be held in 1912.

JUDGE GROSSCUP RESIGNS. — Judge Peter S. Grosscup, circuit judge of the United States for the Seventh Judicial Circuit, tendered his resignation to President Taft on Oct. 23. On Oct. 27 Judge Grosscup was the guest at a dinner given in his honor at the University Club, Chicago, by the Patent Law Association of Chicago.

RESIGNATION OF NORTH DAKOTA JUDGE. — Hon. D. E. Morgan, chief justice of the Supreme Court of North Dakota, resigned on Nov. 1, on account of ill health. Dean A. A. Bruce of the North Dakota Law School at Grand Forks was appointed to fill the vacancy on the bench. Judge B. T. Spalding succeeds Judge Morgan as chief justice of the court.

MARYLAND JUDGE DEAD. — Associate Judge George L. Van Bibber, of the Second Judicial Circuit of Maryland, died on Oct. 5, at Belair, Md. Judge Van Bibber was born in 1845, received his early education at Deer Creek Academy, and graduated from Princeton University in the class of 1865. In 1903 he was elected to the bench of the Second Judicial Circuit, which includes Baltimore and Hartford counties. He was one of the best-known jurists in the State of Maryland.

JOHN MARSHALL MUSEUM. — Richmond will soon have an interesting and adequate John Marshall Museum. The home of the famous chief justice of the Supreme Court, which is now owned by the Association of Virginian Antiquities, is to be filled not only with the furniture that Marshall used, but also with as many of the books and papers that bear his signature as can be collected. The bar associations of Richmond and Virginia have already made appropriations to further the work of gathering these precious relics, and the American Bar Association has recently directed its officers to spend as much money as they think proper to insure the success of the plan.

ELECTED MEMBER OF LAW FACULTY. — Robert E. Cofer of Gainesville, Tex., has been elected a member of the law faculty of the University of Texas. Mr. Cofer graduated in the law

department of the University of Virginia in 1892, practiced law in Gainesville for fifteen years, and has been a member of the Texas state senate for the past four years, a position which he resigned to take the chair offered to him by the University of Texas.

THE EASTERN ASSOCIATION OF JUSTICES of the Police, Municipal and District Courts of Massachusetts held its annual meeting in Boston on Oct. 21. The following officers for the ensuing year were elected: President, Judge Frank A. Milliken, of New Bedford; secretary, Judge Harvey H. Burke, of Boston; executive committee, Justices Milliken and Burke, and Justices James P. Parmenter of Boston, George B. Sears of Salem, and Oscar A. Marden of Stoughton.

DEATH OF NEW YORK JUDGE. — Hon. Maurice L. Wright, former justice of the New York Supreme Court, died at Clifton Springs, N. Y., on Oct. 13. Judge Wright was born in Scriba, N. Y., in 1845, and practiced law in Mexico, N. Y., until his election to the county judgeship of Oswego county in 1884. In 1891 he was elected a justice of the Supreme Court, a position in which he served for fourteen years. After his retirement from the bench Judge Wright was an active and prominent practitioner in the courts of Oswego and New York counties.

CHANGE IN RULES OF UNITED STATES SUPREME COURT. — A reform in the rules of the Supreme Court of the United States to expedite cases awaiting the court's action — sometimes delayed two or three years — was inaugurated on Oct. 23 by Chief Justice White at Washington. Hereafter the time allowed for oral argument of cases will be three hours instead of four. A new rule provides for a "summary docket," on which will be placed cases which the court believes should be specially expedited. The court will arrive at a decision as to these after a motion has been presented to it to "affirm" a decision in a court below. Only half an hour will be allowed each side for argument on cases on this docket. The court also reduced from one hour to forty-five minutes the time allowed for the argument of "motions."

DEATH OF JUDGE SHELDON OF CONNECTICUT. — Judge Joseph Sheldon died at his home, New Haven, Conn., on Oct. 25. He was born at Watertown, N. Y., in 1828, was graduated from Yale in 1851, and began the practice of law at New Haven in 1853. Six years later he became a partner of L. E. Munson. He was a strong anti-slavery man and instituted a lecture course dealing with slavery. During the political campaign of 1860 he made many speeches in behalf of Lincoln's election. When the Civil War broke out he organized a negro military company. Forsaking the law in 1868, Mr. Sheldon went to England, where he became engaged in the manufacture of machine-made brushes. Returning to this country in 1874, he resumed his law practice. He became judge of the New Haven City Court in 1882. As a member of the committee representing Yale he welcomed Louis Kossuth in 1852. He was one of the speakers at the Red Cross conference at Geneva, Switzerland, in 1884. The People's party made him its candidate for governor of Connecticut in 1904.

CHARGED WITH USING MASONIC SIGNS IN COURT. — An unprecedented scene took place at the special sitting of the City Court in Winnipeg recently during the trial of one Charles Warren, charged with the forgery of tickets of a street railway company. Counsel for the private prosecution declared that the accused had been using Masonic distress signs to different witnesses testifying against him. Counsel for the defense hotly resented the insinuation. Judge Walker put an end to the altercation by declaring that, although Warren had elected for a summary trial, he would insist upon sending him up for trial in a higher court. Mr. R. R. Knox, one of the witnesses, said he was a Mason, but that although Warren had tried to convince him he also was a Mason, he did not believe it. Investigation showed that Warren was not a member of any local Masonic lodge.

COLORADO JURIST DEAD. — Oliver Brown Liddell, soldier, lawyer, and jurist, died at his home in Denver, Colo., on Oct. 14, after a short illness. Mr. Liddell was born in Dearborn county, Ind., in 1843. He graduated from the Brookville college at the age of seventeen, and the following year enlisted in the Sixty-eighth Indiana infantry, volunteers. He served three years, commanding his company as lieutenant at the battle of Nashville, Tenn. Mustered out at the close of the war, he studied law until appointed by President Johnson lieutenant of the Eighteenth infantry, U. S. A., and stationed at Fort Morgan, Colo., in 1866. The following year he resigned his commission and went back to Lawrenceburg, Ind., where he completed his law course and practiced for fifteen years. In 1882 he returned to Colorado and settled in Denver to practice his profession. Governor Cooper appointed him judge of the District Court of Arapahoe county, now Denver county, which he held until 1890.

MEETING OF NEW JERSEY BAR COMMITTEE. — A meeting of the New Jersey Bar Association's committee appointed to investigate and report a method to improve the administration of justice was held at the state house in Trenton, on Oct. 14. Former First Assistant United States Postmaster-General William M. Johnson was elected chairman and Senator Silzer secretary. A sub-committee consisting of Chas. H. Hartshorne and Judges William N. Clevenger and Skinner was appointed to devise ways and means for an improvement in general procedure. There was a discussion before the committee was appointed regarding the plans of reform, but it was decided to leave everything to the sub-committee, the report of which body will be transmitted to the next meeting of the New Jersey Bar Association. Those present were former Justice Van Syckel, Justices Bergen and Swayze, Vice-Chancellors Walker and Howell, Senator Silzer, Gilbert Collins, Judges Skinner and Gaskill, and William N. Clevenger, former justice.

THE VERMONT STATE BAR ASSOCIATION held its thirty-third annual meeting at Montpelier, Vt., on Nov. 7. The president's address was delivered by Hon. James M. Tyler, of Brattleboro, his subject being "The Temple" in London. Other speakers and their subjects were as follows: "International Arbitration," by Congressman D. F. Foster; "The Supreme Court," by F. D. Thompson, of Barton; "The Superior Judges," by Judge William H. Taylor, of Hardwick; "The United States Court in Vermont," by Alex. Dunnett, of St. Johnsbury; "The Bar of Montreal," by E. Fabre Surveyer, K. C., of Montreal; "The American Bar Association," by George B. Young, of Newport; "The Class of 1911," by Levi Smith, of Burlington. The following officers were elected for the ensuing year: President, R. E. Brown, Burlington; vice-presidents, C. C. Fitts of Brattleboro, J. G. Sargent of Ludlow, and Frederick G. Fleetwood of Morrisville; secretary and librarian, John H. Mimms, St. Albans; treasurer, Erwin M. Harvey, Montpelier; board of managers, H. C. Shurtleff of Montpelier, C. D. Watson of St. Albans, Max L. Powell of Burlington.

COMMITTEE RECOMMENDS FEDERAL COURT REFORMS. — United States Attorney Robert T. Devlin, Attorneys Curtis H. Lindley, Garret W. McEnerney, W. S. Goodfellow, and John H. Miller, composing a committee of members of the California bar appointed by the United States Circuit Court to suggest modifications in the existing procedure before the federal courts, have submitted a report to the United States Supreme Court in which they recommend numerous changes in the pleading and practice in equity cases. The report is exhaustive, and its

makers express the belief that if its recommendations are carried out the practice of law before the United States courts will be materially bettered. The first thing recommended is that the bill of complaint shall be as simple as possible, avoiding all formal and unnecessary matter. It is said that the bill should be sufficient, if it contains a statement of the ultimate facts constituting the cause of action, expressed in ordinary and concise language, together with a demand for the relief that the plaintiff claims. Many technical modifications are suggested in regard to the names of parties to suits, steps in the suit's progress, the processes of the court, warning orders, and other details of litigation. The abolition of rule days, as provided in the present equity rules, is recommended, although it is held that the courts should fix days for the purpose of passing upon demurrers, motions, and similar matters.

DEATH OF JUSTICE JOHN M. HARLAN. — Associate Justice John Marshall Harlan, the oldest member of the Supreme Court of the United States, died at his home in Washington on Oct. 14. He was seventy-eight years old. Justice Harlan was born in Kentucky in 1833, and graduated from Centre College at the age of seventeen. He followed in his father's footsteps in adopting law as a profession, but took to politics and became a county judge before he was twenty-five. In 1859 he was defeated for Congress from the Henry Clay district by William E. Simmons, whose political disabilities following Confederate service were removed later at Harlan's instance. Harlan was colonel of volunteers in the civil war. Later he became attorney-general of Kentucky, was twice defeated as Republican candidate for governor, defeated for nomination as Republican candidate for vice-president, and headed the Kentucky delegation to the Republican national convention in 1876, when he turned his delegation from Bristow to Hayes, leading to the latter's nomination and subsequent election. President Hayes, unable to accede to Harlan's request to be appointed attorney-general, placed the Kentuckian, at forty-four years of age, upon the Supreme bench. In 1884 he was appointed judge of the Court of Commissions of Alabama Claims. In 1893 he was appointed a member of a board to arbitrate between the United States and Great Britain in the controverted Behring Sea seal fisheries cases. During his long service as a justice he attracted national attention many times by his dissenting opinion in famous cases. His dissent in the famous civil rights cases which involved the right of proprietors of places of amusement, inns, and conveyances, to draw the color line, found many supporters among the most eminent jurists of the day. As recently as last May he attracted the attention of the entire United States by his dissent from the Standard Oil decision and the "rule of reason." During his many years on the bench, the hundreds of adverse opinions filed by him won him the title of "the dissenter of the Supreme Court." Justice Harlan's great ambition was to serve until next June, when he would have exceeded the service of any other man who had sat on that bench. As it was, his service was longer than that of any other justice except Chief Justice Marshall and Associate Justice Stephen J. Field. Field's was the longest service — 34 years, 6 months and 10 days; Marshall's, 34 years, 5 months and 5 days; Harlan's, 33 years, 10 months and 25 days.

DEATHS. — In addition to those mentioned above, the following deaths in the profession have occurred since our last issue: Ex-Judge Lucian Adams, Rock Island, Ill.; Judge Gustave Anderson, Omaha, Neb.; William H. H. Anderson, Baltimore, Md.; ex-Judge B. P. Bailey, Jackson, Ga.; Lancaster D. Baldwin, Marion, Ind.; Carlisle Barrere, Columbus, Ohio; George W. Bowen, Carroll, Ia.; Arthur Crossman Bradley, Newport, N. H.; C. F. Breckenridge, Omaha, Neb.; Harold Bruff, Brooklyn, N. Y.; Kennard Buxton, Brooklyn, N. Y.; Judge C. E. Cahoon, Emmetsburg, Ia.; William F. Cameron, Chicago, Ill.; Frank T. Cole, Columbus, Ohio; George Crane, Duluth, Minn.; Sherman Culp, Norwalk, Ohio; Thomas N. Cureton, Point Arena, Cal.; John D. Dalton, St. Louis, Mo.; Martin Davis, Rochester, N. Y.; Sherrerd Depue, Stirling, N. J.; Theodore C. Disbrow, Ulster, Pa.; Maurice H. Doorly, Brooklyn, N. Y.; Theodore C. English, Elizabeth, N. J.; Edgar H. Farrar, Jr., New Orleans, La.; Judge B. Marion Fernald, Melrose, Mass.; W. T. Fielder, Waynesboro, Tenn.; Charles A. Garter, San Francisco, Cal.; William R. Geddes, Mankato, Minn.; Norman A. Gilbert, Cleveland, Ohio; Dudley Glenn, Latonia, Ky.; Arthur Gorrell, Newton, Ia.; S. J. Hatfield, Sidney, Ohio; John Oxenbridge Heald, New York city; Frank A. Hiller, St. Louis, Mo.; Ralph H. Holland, New York city; Walter Morton Howland, Amherst, Mass.; Isaac Jenkinson, Richmond, Ind.; T. P. Jones, Uniontown, Pa.; Judge James C. Klugh, Abbeville, S. C.; E. Tyler Lamkin, Monroe, La.; Thomas R. Lane, New York city; Edgar Madden, New York city; J. R. Madden, Tucson, Ariz.; Robert Mather, New York city; Charles G. McRoberts, Chicago, Ill.; Philip Mighels, Winnemucca, Nev.; Henry E. Miller, Syracuse, N. Y.; Judge L. W. Moore, La Grange, Texas; James H. O'Neil, New York city; Campbell Patterson, Washington, Ia.; William R. Payne, Chicago, Ill.; Ernest Rehm, Marietta, Ohio; John F. Sanderson, Pittsburg, Pa.; Charles D. F. Smith, Chicago, Ill.; John Steinlein, Sand Point, Idaho; David Stewart, Chehalis, Wash.; G. W. Stewart, St. Cloud, Minn.; Henry Strong, Denver, Colo.; Judge E. O. Sykes, Aberdeen, Miss.; Grant B. Taylor, Pittsburg, Pa.; Judge Robert W. Taylor, Lisbon, Ohio; ex-Judge Joshua L. Thorn, Gallipolis, Ohio; John J. Trapp, Flushing, L. I.; Judge B. M. Webb, Smithville, Tenn.; Henry Whitaker, Pilot Mountain, N. C.; Carroll Wright, Des Moines, Ia.; James E. Young, New York city.

English Notes.

NATIONAL CRIMINAL TENDENCIES. — A Paris contemporary has been instructing its readers upon the specialties of the various foreign delinquents who come before the criminal courts in the French capital. English and Americans, we read, generally have to answer charges of picking pockets. Russians and Spaniards are swindlers. Turks have to answer acts of violence, and Belgians fraud and forgery. The Italian is generally charged with unlawful wounding; the Arab with offenses against decency. The Hungarian is noted for mendicity and the white-slave traffic. The German specialty is usury or trade cheating. — *Law Times.*

NEW SOLICITOR-GENERAL FOR IRELAND. — The appointment of Mr. Serjeant O'Brien, K. C., as the solicitor-general for Ireland, gives great satisfaction in legal circles in Ireland. The new solicitor-general first acquired a reputation as a practitioner in the Bankruptcy Court. His practice gradually widened out until he became the foremost commercial lawyer in the Four Courts. He was standing senior counsel to the Dublin Corporation, and he is regarded as an excellent authority on matters of local government interest and on the construction of statute law. Since the passing of the Local Government Act 1898 he has been engaged on one side or the other in nearly all the cases of importance arising under that Act.

RIGHT TO RECOVER RENT FOR HAUNTED HOUSE. — Rarely has any judge been more thankful to be able to avoid a finding of fact by a decision on a point of law than His Honor Judge Harrington in a case which came before him at the Wadsworth County Court a week or two ago. The defendant, having taken a house of the plaintiff for twelve months, declined to pay the

rent on the ground that the house was haunted; and it is not surprising that the learned judge was of opinion that, even if such a state of affairs were made out, it would form no defense in law to the claim. From the published reports it does not appear whether the house was let furnished or unfurnished. If the latter, it is clear that no warranty of freedom from ghosts could attach, and even the most subtle mind could hardly suggest that it could be brought within the covenant of quiet enjoyment; while, on the other hand, if the house were let furnished, we hardly think the courts would be disposed to class ghosts with the other occupants of premises that have been held to render furnished houses uninhabitable.

LEGAL PROBLEMS ARISING OUT OF AIR CRAFT. — The disaster to the new British airship emphasizes to what extent man can claim to have achieved the so-called conquest of the air. Striking incidents for a time seem to encourage the idea that atmospheric conditions can be regarded with less concern, and then some such failures as have dogged the efforts of British and foreign experimental airships illustrate the fact that in times of war the use of such craft might very easily be rendered impossible at certain seasons by weather conditions for a period long enough to cover the whole of some desperate crisis deciding finally where the ultimate victory is to rest. It is quite possible to concede this and yet to argue that the legislature must at no distant time seriously consider the problems of law which arise out of air craft of all sorts. To those who live near Brooklands or Hendon the constant passage of air craft is introducing new perils, and questions of trespass will arise under which the parties to a dispute may not get the justice to which they are entitled. Any such disputes may lead to defenses turning on identity, and it is quite difficult to see how to provide adequately for identifying a craft capable of getting beyond inspection by such easy and rapid means. Some definite rule of the road will also have to be arranged to insure safety. Legislation should not be left until some tragic event causes its necessity to be recognized by all.

PARLIAMENTARY CONTROL OF ENGLAND'S FOREIGN POLICY. — The articles in the lay press in which surmises are embodied in reference to the attitude of Great Britain in relation to the war between Italy and Turkey, and the various complications likely to arise therefrom, are in themselves object lessons of the fact, to which attention has so frequently been directed in these columns, that the attitude of Great Britain in foreign affairs is governed, not by Parliament, but by the Cabinet. In the direction of the foreign policy of that country, Parliament has no effective control. The prerogatives of declaring war and making peace and of entering into treaties, like other great prerogatives of the Crown, have in their exercise been transferred to the Cabinet — a body no doubt responsible to the House of Commons, but not required, in accordance with the practice of the Constitution, to take Parliament into its confidence in reference to the proposed exercise of these powers. These prerogatives must no doubt be exercised on the advice and upon the responsibility of ministers who are of course accountable to Parliament, and the necessity of obtaining adequate supplies for the prosecution of a contest with any foreign power and the control possessed by Parliament over the army and the navy by the Annual Act, coupled with the existence of ministerial responsibility, constitute some checks, although not sufficiently powerful, against the improper use of these prerogatives. Mr. Bryce, in his great work, The American Commonwealth, when explaining the control of foreign policy by the Senate of the United States, thus writes: "The day may come when in England the question of limiting the at present all but unlimited discretion of the executive in foreign affairs will have to be dealt with, and the example of the American Senate will then deserve and receive careful study." On March 19, 1886, a resolution desiring all treaties to be laid before Parliament for its approval before being finally concluded was all but carried in the House of Commons. It was defeated by four votes only.

NECESSITY OF FORMAL DECLARATION OF WAR. — The formal declaration by Italy that she "considers herself from this moment in a state of war with Turkey" may be regarded as a method of procedure more precise than is requisite in accordance with the existing usage. The conditional Italian ultimatum in writing setting forth the essential demands succinctly, and giving a certain limited time for compliance, may be regarded in itself as a form of declaration of war, since, if such terms are not acceded to within the time prescribed, war begins, as in the recent conflict betwen the Boer Government and Great Britain. Negotiations precede war, and their nature warns the parties interested of the probable outcome. The recall or dismissal of diplomatic representatives is generally the last step before actual hostilities, although this may occur without war. War may begin with a proclamation or manifesto by a country endeavoring to show the justice of its cause and the bad faith of its adversary, loosely spoken of as a declaration of war, or by a formal declaration of war, or the first act of naval or military force against the opposing state. On account of the provision in the Constitution of the United States giving power to Congress to declare war, formal declarations will probably remain usual with the United States and other nations with like institutions. The constitution, so short-lived, under which Napoleon proposed to reign after his return to power in 1815, contained a similar provision. According to modern usage, a declaration of war not being necessary, nations generally content themselves with a proclamation to their own citizens of the existence of war and a formal notice to neutral states. In a civil war there is never a formal declaration of war. It has been held that the great civil conflict in the United States began with the President's proclamation of blockade of the 27th April, 1861. The United States did declare war against Great Britain in 1812, and against Spain on the 25th April, 1898; but in the first instance the United States began active hostilities before the news could cross the ocean, and in the second, the declaration recognized that war had existed since the 21st April. England captured New York, in 1664, before declaring war against Holland, and, before the Seven Years' War was declared, captured hundreds of ships and thousands of prisoners from France. Since the peace of 1763 the European practice has been even more irregular, and the necessity of a declaration is generally denied. In 1870 the representatives of France at Berlin handed the German Government a note simply declaring that "le gouvernement de S. M. Imp. se considère dès à présent comme étant en état de guerre avec la Prusse," and in 1877 a dispatch to the same effect was delivered to the representative of Turkey at St. Petersburg. Such are the survivals of the mediæval practice according to which knightly honor forbade an attack until after full notice.

RECOVERIES UNDER WORKMEN'S ACTS. — The statistics under the Workmen's Compensation Act and the Employers' Liability Act for the year 1910 show that in the seven great industries of the country — mines, quarries, railways, factories, docks, constructional work, and shipping — the gross total of compensation paid was £2,700,325, and represented 3,510 cases of death and 378,340 cases of disablement, the compensation paid exceeding the figure for the previous year by £426,000. Naturally a large number of the cases under the Act are settled out of court, but, during 1910, 4,848 cases under the Workmen's Compensation Act were actually dealt with by County Court judges and arbitrators. Of these, 4,550 were decided by the

judges, and 210 were settled by acceptance of money paid into court; and, in addition, 1,818 cases were disposed of in such a way as not to enable the officials of the court to state definitely the results. Thus the total cases taken into court under the Act of 1906 was 6,666, as compared with 6,188 in 1909 and 5,358 in 1908. Memoranda registered in County Courts during 1910 numbered 20,754 under the Act of 1906 and 347 under the earlier acts, the figures for the preceding year being 18,197 and 566 respectively. In 371 cases the registrar refused to record the memorandum and referred the matter to the judge; and in five cases the judge after the memorandum had been recorded ordered it to be removed from the record on the ground that it had been obtained by improper means. Another large diminution must be recorded of cases brought under the Employers' Liability Act. But 162 cases were brought under that statute in 1910, as against 204 in 1909 and 688 in 1897, and in fourteen of these 162 cases the question of compensation was actually determined under the Workmen's Compensation Act. The average amount of damages in case of death awarded by County Courts was in the one case under the Employers' Liability Act £250, and in the 1,134 cases under the Workmen's Compensation Acts £163. 13*s.* 8*d.* The average amount of solicitors' costs was £26. 17*s.* 11*d.* under the former statute and £11. 7*s.* 6*d.* under the later Acts. Appeals carried to the Court of Appeal in England show no sign of diminution, and amounted in 1910 to 136, being one in excess of the figure for 1909 and 24 more than in 1908. There were nine appeals from the Court of Appeal to the House of Lords, as compared with two in 1909, the workman being the appellant in seven cases, five of which were successful. These figures clearly show that the great majority of claims are settled by agreement, and that only a small proportion are the subject of litigation in the courts. The greatest number of arbitrations under the Workmen's Compensation Acts was at Liverpool (namely, 363), Bow following with a total of 235. Under the Employers' Liability Act, nearly half the number of the whole of the cases under that statute were in the metropolis, and there were only nine courts throughout England and Wales in which there were no cases under either of the statutes.

NEW COPYRIGHT ACT. — The Bill to amend and consolidate the law of copyright is not likely to undergo much change in the Lords after the detailed criticism it has received in its passage through the House of Commons. One of the main objects of the Bill is to extend the existing period of forty-two years to one of fifty years. This is followed by a proviso to the effect that after a period of twenty-five years has expired (or a period of thirty years in the case of a work in which copyright now subsists) from the death of the author of a published work, the book can be reproduced for sale without infringement, if the reproducer gives notice of his intention so to do and pays certain royalties. Another clause of great importance will in effect compel the owner of a copyright to republish, or allow republication. The clause will take effect, as drafted at present, "at any time" after the death of the author. The class of work is, however, not entirely general, but comprises "literary, dramatic, or musical work which has been published or performed in public." The Judicial Committee of the Privy Council is to have power, on a complaint being made, to order the owner of the copyright to grant a license on terms and conditions to be determined by itself. The interpretation of the word "copyright" as heretofore understood has necessarily to be widened to cope with such modern inventions as pianolas and cinematographs. It is proposed now to embrace the reproduction of "any substantial part" of a work "in any material form whatsoever and in any language," and to bring within the Bill lectures, and the conversion of literary, dramatic, or musical works into records, perforated rolls, cinematograph films, and "other contrivances" by means of which such works can be mechanically performed. On the other hand, the Bill expressly seeks to exclude from the penalties of infringement fair dealing with a work by way of newspaper summary or research, or drawings of sculpture, or reproductions amidst matter, in the main composed of noncopyright material, *bona fide* intended for school use and so described in its title, of short passages from literary works in which copyright exists. Even this, however, is further hedged in by provisos, for the source must be acknowledged, and not more than two of such passages from the work of the same author can be published by the same publisher within five years. Further security is given to lecturers by enabling them, by a printed notice affixed to the main entrance of the building in which the lecture is to be delivered and also near the lecturer himself, to prohibit its publication in a newspaper. This, however, is not to detract from a newspaper's right to publish a summary. Newspapers are further given an express power to publish a report of an address of a political nature without infringing copyright. A point of no small complexity arises where a foreign author first publishes a work in this country and is a native of a state conferring no adequate protection to works of British authors. The difficulty is met by enabling His Majesty in Council to direct that the provisions of the new measure conferring copyright on works first published within our dominions are not to apply to citizens of that country not resident in our dominions. Clause 29, dealing with international copyright, is one of the greatest importance. The general object is to enable an Order in Council to apply the measure to works first published abroad and to literary, dramatic, musical, and artistic works made by foreign subjects, and, moreover, to treat residence abroad as though it were residence at home. This general purpose is, however, whittled down by a whole set of provisos whereby it is proposed to secure certain points in the interests of British authors. These include provisions such as His Majesty may deem expedient to require for the protection of works entitled to copyright under Part 1, in itself an exceedingly elastic expression, and provisions limiting the term of copyright to that subsisting in the country to which the order relates. This particular clause suggests possibilities of greater clarity were it redrafted into some shorter and more comprehensive form. A very important clause may be found — viz., clause 31 — which debars persons from title to copyright in works, published or unpublished, otherwise than under this new measure. This cuts away the old common-law rights concerning which difficulties have in the past arisen.

"IT would be a startling thing to say that a farmer, when he has driven into a country village to do business at the village store or at the village inn, may not, however brilliantly his fancy may have led him to have his wagon or other vehicle painted or otherwise adorned, after securely tying his horse, leave him standing in front of the store or the inn while he is attending to his business, without incurring the risk of having to pay damages to the owner of a sensitive horse that has had the bad taste to take fright at the thing of beauty that has been left standing in the highway, and to run away, doing injury to himself, or, it may be, to his owner or to the vehicle to which he was attached. If, as I think, the farmer would not be answerable for the damages in such a case, why should the owner of the motor car in a like case be answerable?" *Per* Meredith, C. J., in McIntyre *v.* Coote, 19 Ontario Law Rep. 9, 14.

Obiter Dicta.

A FOREST IDYL. — Wood *v.* Lake, 62 Ala. 489.

IN THE KITCHEN. — Cook *v.* Mackrell, 70 Pa. St. 12.

A MASONIC QUARREL. — Shriner *v.* Craft, 166 Ala. 146.

NOT TO SOME. — "A loaf of bread is a well-known object." *Per* Magee, J. A., in *Re* Bread Sales Act, 23 Ont. L. Rep. 247.

DUBS! — "Relators below will be dubbed 'plaintiffs;' respondents, 'defendants.'" See State *ex rel.* Porter *v.* Hudson, 226 Mo. 239.

A BONEHEAD. — In State *v.* Bone Dykes, 83 Kan. 250, the defendant was foolish enough to get caught selling beer in violation of the statute.

TOO LATE. — "He fell to the river below, a distance of about sixty feet, and when rescued was dead." *Per* Hobson, J., in Gould Construction Co. *v.* Childers, 112 S. W. Rep. 622.

FREQUENTLY ATTEMPTED WITHOUT SUCCESS. — "You cannot make by discussion anything plain which by the words used is already plain." See State *v.* Brock, 61 S. C. 141.

A RAP FROM THE BENCH. — "With this disposition of the rubbish thrown into the case, we can now take up the real issues." *Per* Graves, J., in *In re* Estate of Jarboe *v.* Jarboe, 227 Mo. 59.

A DISTINCTION WITHOUT A DIFFERENCE. — In Francis *v.* Mutual L. Ins. Co., 106 Pac. Rep. 326, the report of the defendant's medical examiner to the company concerning the insured contains the following statement: "Have known him twice to be loaded but never drunk."

ANOTHER MISLEADING NAME. — In line with the "General" Wadkins referred to in our last issue is "Colonel" E. Witty, the defendant in the case of Witty *v.* State, 173 Ind. 404. Witty was not a soldier, either past or present, but a "specialist in chronic diseases."

THE WAY THE GIRL STENOGRAPHER TRANSCRIBED IT. —

Weapons.

Right to bare arms, see Constitutional Law.

Injunctions.

Restraining waist, see Waist.

MUCH IN THE MINORITY. — After writing four and three-quarters pages of opinion in Union Traction Co. *v.* Howard, 173 Ind. 335, Myers, J., nonchalantly observes: "The foregoing are the views of the writer, but all the other members of the court are of a different opinion."

AN OLD LAWYER'S CARD. — This lawyer advertising business is not so new. Witness the following which appeared in the Connecticut *Courant* of May 16, 1810:

R. Douglass

Intends practicing Law in Chilcothe, if he can get anything to do. He intends to be *honest likewise.*

SHAKESPEARE UP TO DATE. — In the case of Beeman *v.* Kitzman, 134 Iowa 86–94, Mr. Justice Weaver thus disposes of an attempt to recover from the defendant the plaintiff's attorney's fees: "While there is no inherent injustice in requiring defendant to yield the 'pound of flesh' to which the plaintiff is entitled, we think that under the circumstances it would be going entirely too far to compel him to pay for the knife by which the vivisection has been accomplished." What need of a Portia before such a judge?

GOOD BUT NOT RESPECTABLE. — The *Ohio Journal of Commerce,* in its issue of Oct. 28, slams us good and hard thusly: "It is regrettable that the business men of Ohio are not represented strongly in any of the delegations which are to be elected for the constitutional convention to be held after the election next month. Very few of the strong men in any line are represented in the different delegations. In a list of ten selected by a local newspaper there are four good lawyers, two subordinate public officials, one or two cranks, one ignoramus, and one respectable citizen."

CALLING ON THE CONSTITUTION. — "Said Owen Glendower (sweepingly):

'I can call spirits from the vasty deep.'

Retorted young Henry Percy, surnamed Hotspur (full of critical doubt):

'Why, so can I, and so can any man;
But will they come when you do call for them?'

Somewhat as it was of old in the days of Henry IV., Falstaff, Mortimer, Glendower, Poins, Bardolph, and Hotspur, *et al.,* with spirits, so it is now with constitutional points. A litigant may call on the Constitution, but will it come?" *Per* Lamm,

P. J., in Ordelheide *v.* Modern Brotherhood of America, 226 Mo. 203.

NO DESIRE TO MEET HIM. — A correspondent writes us from Bainbridge, Ga., saying that some time ago he was appointed by the court to defend a negro charged with murdering his wife. He succeeded in securing a verdict of acquittal, and the defendant returned home, promising to pay his attorney a good-sized fee on the instalment plan. About three weeks after the trial the attorney received a letter from his former client, a copy of which follows: "Mr. ——— I is dyin with tyfoy fevr and I is sorry I cant pay yu no muney for fennin me in cort. I no i wil go to hel for killin my pore wife, I wish you well and hope to meet you in the next worl. yore tru fren, abe nelson." Our correspondent wants it distinctly understood, however, that he is living so that he won't meet his client in the "nex worl."

ADMITTED TO OUR HALL OF FAME. — A correspondent from the State of Washington pleads before us the claim of A. J. Speckert, of Seattle, to be the champion versatile man among lawyers. It seems that Mr. Speckert has been advertising in the magazines as follows:

As if that were not enough, he has inserted this "ad." in one of the daily newspapers, in the column headed "Society Notices:"

> A. J. SPECKERT, lawyer, lecturer. Corporations organized, damage cases, notary public. Offices, Stevens Dancing Academy, Fourth, near Pine. Main 4367; Ind. 89.

And again, farther down in the same column, we find this:

> MARRIAGE ceremonies performed.
> Funeral orations.
> Phones: Main 4367; Ind. 89.

Our correspondent also furnishes us a few extra details as follows: "He is a Spiritualist and seems to be working that cult for all that there is in it, and I am informed and believe that recently in one of his cases here he tried to have two spirit witnesses sworn to prove his contention in a certain case. Of course, this was denied him." Whether or not Mr. Speckert is entitled to be called the champion advertiser, we cheerfully admit him to our Hall of Fame.

LIQUOR EXPERTS. — "One who has drunk a considerable quantity of a liquor does not have to be an expert in order to form a reasonably trustworthy opinion as to whether it is intoxicating or not. There is something presageful about a drink of intoxicating liquor, even though it be too small to produce full intoxication. The less expert the taker of the drink is in the matter of drinking, the more accurate his opinion is likely to be." *Per* Powell, J., in Wilcox *v.* State, 8 Ga. App. 536. Carrying this argument out to its logical conclusion, would not a member of the W. C. T. U. be the very best possible liquor expert obtainable?

LATIN SCHOLARS BEWARE! — The following is a verbatim copy of a motion paper filed in a cause in the Oklahoma Superior Court last month:

IN THE SUPERIOR COURT, IN AND FOR PITTSBURG COUNTY, STATE OF OKLAHOMA.

Charley Taylor *vs.* J. H. Morgan et al. No. ——— Motion to Strike.

Comes now Charley Taylor, by his attorneys, Newman & Kendrick, and moves to strike from the demurrer of defendants Morgan *et al.* the Latin phrases "virtue officii" and "colore officii" for the reason said phrases are not within the personal knowledge of the attorney, Geo. M. Porter, who used them, but are merely the conclusions of attorney Guy A. Curry; that said Guy A. Curry has not been qualified as an expert in the use of Latin phrases; that the legal right of said Guy A. Curry to act as tutor of said Geo. H. Porter has not been shown; and for the further and final reason that the pronunciation by said Geo. M. Porter of said Latin phrases is *prima facie* evidence that his knowledge of Latin phrases is confined solely to those used on canned tomato labels and patent medicine circulars, and that said Geo. M. Porter is absolutely ignorant of the potent, dangerous, and explosive power of such phrases in a suit of this nature, and is therefore liable to greatly endanger and permanently injure plaintiff Charley Taylor, in his corporeal entity, by the promiscuous use of said Latin phrases, and against the peace and dignity of this plaintiff.

Wherefore, in the interest of public policy, and for the immediate preservation of the public peace, health, and safety, this plaintiff prays that said dangerous phrases be immediately

stricken from said demurrer, and emasculated and held for naught, in order that they may not endanger the life of the janitor of this court when he sweeps them out.

KENDRICK & NEWMAN,
Attorneys for Plaintiff Taylor.

Time certainly must hang heavy on the hands of the profession in Oklahoma.

A LITTLE INFORMATION WANTED. — We are indebted to the law firm of Sturgis & Manatt, Enid, Okla., for the following true copy of a letter recently received by the register of deeds of Garfield county, Oklahoma. The writer of the letter evidently knows what he wants, but, like many others, is unwilling to pay for legal advice or services if he can possibly avoid it:

Mr Charles B. Longcor, Reg. of Deeds.
Enid, Okla, U. S. A.

I am asking for a little Information, in regards to my lot. Lot thirteen (13), Block One (1), Rowlands' Addition to the City of Enid, Okla.

I want to will it to my Fother & Mother, they will move upon it in the spring of 1912, and as long as they live upon it it will belong to them. L. W. Thomas, Liccy Thomas,.
Fother, Mother,

But it can never be sold by Eather of them, or by any of said party or Family or by myself. and as along as they live upon it it will belong to them L W. Thomas, L. Thomas.

But after they die I can sel it, if alive. and can never Be Sold or Mortgaged. (to any One). While they are Alive. and if they should pass away (die), the Lot Comes back into my hands or (Name). and if I should Get Married and Die before My Parents Die, the Lot Will shall go to My Wife. and if not Married and Die, before my Parents Die, and they should Die after me the lot will belong to The Socialist Party of America. after my Parents (Die).

I am Yours Most Cordially.
Mr. H. M. Thomas,
GREEN COURT, ALTA, CAN.

Correspondence.

SUMMONING JURORS BY MAIL.

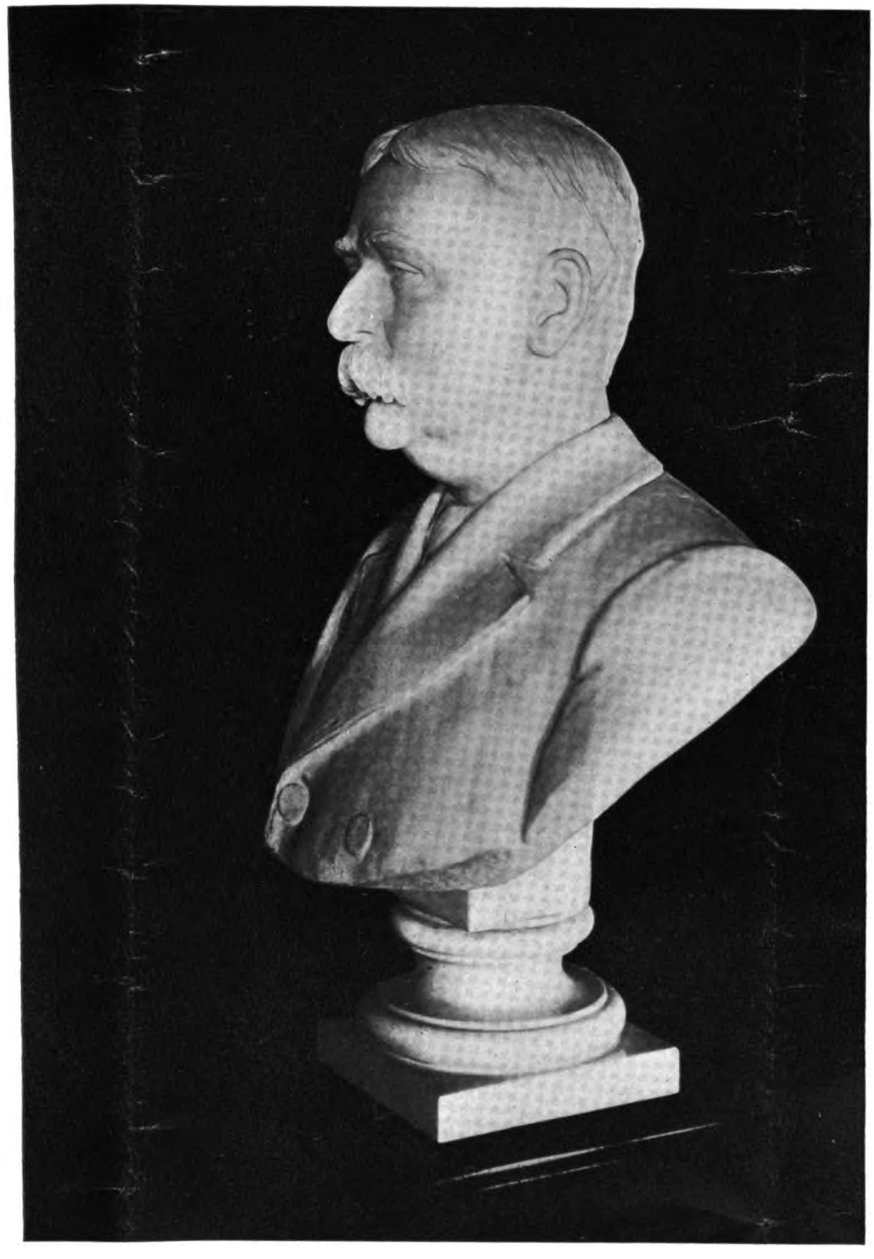
To the Editor of LAW NOTES.

SIR: In November LAW NOTES you have an article on Summoning Jurors by Mail, in which you refer to the attempt made to have such a law enacted in Oklahoma, and then say: "The proposed innovation seems to have made no impression on the Oklahoma legislators."

On the contrary, on March 15, 1910, an act was approved providing for service of jurors, grand and petit, in District and Superior Courts, and jurors in County Courts, by the sheriff giving them notice "orally in person, over the telephone, by telegraph, or by registered or ordinary mail, in the discretion of the judge of the court ordering the juries." Session Laws 1910, page 84. Similar provisions are made for service of summons and subpœnas for witnesses.

H. S. BRAUCHT.

NEWKIRK, OKLA.



JAMES COCKCROFT

Law Notes

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CONTENTS

Government by a Dissenting Judge.

"WE think," says the *Saturday Evening Post,* "the time is approaching when cancellation of legislative acts except by unanimous judgment of the court will not be tolerated." This is the idea embodied in Senator Bourne's bill introduced in Congress last August, and which will, we presume, be reintroduced at this session. The objections to it both on legal and political grounds will seem to many minds so strong that we should be surprised if it passes, and much more so, of course, if it receives the recognition and approval of the Supreme Court. John Doe, for instance, has been tried and sentenced under the criminal provisions of the Sherman Act. The question of the constitutionality of the act reaches the Supreme Court. Eight justices come to the conclusion that the provisions mentioned infringe the Constitution and that John should be given his liberty. Yet because the ninth alone believes that the provisions are valid the judgment of the court, if the validity of the proposed act be recognized, must continue John's confinement in durance vile. Would not the effect of the Bourne Act in such a case be the substitution of the will of the legislature or the views of the dissenting judge for the opinion of the court? Can it be contended that the Constitution contemplates a legal vacuum, a situation in which legislation is validated not by the opinion of the court but because of the lack of any opinion? But it is, it seems, the theory of a vacuum on which the Bourne bill is based. Legislation is to be operative not because the court approves of it but because the legislature has declared, on the analogy of a hung jury, that the court has no opinion. Repeated attempts would be made to obtain an unanimous decision. The death of our supposititious lonely dissenter would be eagerly awaited in the hope that the new judge would swing into line with his colleagues. The power which such a law would put into the hands of the President is enormous. Imagine the election of an executive intensely anxious to force the enactment of legislation which it is believed would probably be declared invalid, or who would even go so far as to believe as a general principle that the constitutional restrictions on legislation should be greatly weakened. His object could be easily accomplished by placing in the first vacant judicial chair a man known to him to be in sympathy with the presidential program, and with legal opinions in consonance with that predilection. Instead of the so-called oligarchical rule of the Supreme Court, should we not then have a monarchical rule under a dissenting judge? Nor must it be forgotten that the number of the judges is fixed by Act of Congress. Would not an ultra-radical body of legislators be inclined to enlarge that number to such a degree as materially to lessen the likelihood of unanimity? Unanimous opinions from fifteen judges would not be so frequent as those from nine.

The Greatest Library of English Law.

A RECENT reference in a Boston newspaper to the Elbert H. Gary Library of Law at Northwestern University as "undoubtedly the most remarkable institution of its kind in the whole world" elicited a protest from Librarian Arnold of Harvard Law School. The Gary Library, as will be seen from a more detailed reference to it in another column, contains over 44,000 volumes in addition to the collection on Anglo-American law. This collection, which includes the English and American reports, digests, series of collected cases, and other modern works, must, judging from libraries of the same kind of which we know, number at least 20,000 volumes, making the total Gary collection probably 65,000 or more. Mr. Arnold pointed out, however, that by January 1, 1912, the Harvard Library would contain at least 150,000 volumes, of which 20,000 will have been added during the present year. "Bigness," he says, "is not a test of quality, but I think we can modestly say that in quality we have no fear of comparison with any law library in this country or abroad." He refers to the recent acquisition by the Harvard Library of the Olivart collection of International Law, "the most remarkable collection on this subject in the world," and says that the assistant librarian has just completed a remarkably successful search in Europe for old books on various branches of Continental law. Mr. Arnold is of the opinion that "no library in this country contains so full a collection of the reports and statutes of the Dominion of Canada as ours. It is possible that the Library of Parliament at Ottawa may have a more complete collection. I am credibly informed that our collection of modern Anglo-American law, Roman and civil law, ecclesiastical law, jurisprudence and philosophy of law, and Anglo-American legal history far surpasses the collection in the Gary Library. Undoubtedly no one large library is as complete in all departments as some other may be in some of its departments, but with the information at hand, I cannot see any basis for the statement that the Gary Law Library is undoubtedly the most remarkable institution of its kind in the world." A less interested opinion is that of Professor A. V. Dicey, of Oxford, who wrote as follows in the *Contemporary Review* for November, 1899, on "The Teaching of English Law at Harvard:" "The Law School forms a sort of university within the University. Its library constitutes the most perfect collection of the legal records of the English people to be found in any part of the English-speaking world. We possess nothing

like it in England. In the library at Harvard you will find the works of every English and American writer on law; there stand not only all the American reports — and these include, as well as the reports of the federal courts, reports from every one of the forty-five States of the Union — but also complete collections of our English reports, of our English statutes, and of the reports and statutes of England's colonies and possessions. Neither in London nor in Oxford, neither at the Privy Council nor at the Colonial Office, can one find a complete collection, either of American or even, astounding as the fact sounds, of our Colonial reports."

Famous Legal Octogenarians.

REFLECTIONS on the advisability of age limits for judges are suggested by the fact that one of the most eminent members of the American bar, Hon. John F. Dillon, has just completed his eightieth year, and before our next number is issued another name, that of Hon. Joseph H. Choate, will, we hope, be added to the list of famous legal octogenarians. Mr. Choate is still in frequent attendance at his office, while Judge Dillon has only recently completed the task of personally revising his great work on Municipal Corporations. The latter has been fifty-nine years and the former fifty-six years at the bar. The ambassadorship to Great Britain is the only public office Mr. Choate has held. Judge Dillon became a district judge in Iowa fifty-three years ago. After holding that position for five years, he served for six years in the Supreme Court of the State, and completed his judicial career by a term of ten years as a federal judge. For the three years following, 1879–1882, he was a professor of law at Columbia. One of the most interesting facts in Judge Dillon's career is that he, like Sir Robert Finlay, ex-Solicitor-General and Attorney-General of England, took a degree in medicine before entering upon the study of law. The English bar too can boast of an eminent octogenarian member whose energy has lately brought him again into the limelight. The Earl of Halsbury, ex-Lord Chancellor, one of the most vigorous of the "last ditchers" or defenders of the House of Lords, and the reputed founder of the B. M. G. (Balfour Must Go) Club, is the oldest of the trio, being now in his eighty-seventh year. As Hardinge Stanley Giffard he was admitted to the bar in 1850, took his Q. C. or "silk" in 1865, was Solicitor-General from 1875–1880, and Lord Chancellor from 1895–1905, his seventieth to his eightieth year. Even yet this wonderful old man, who has been referred to as one who has learned the secret of perpetual youth, although supposed to be in retirement frequently comes to the assistance of the younger law lords. The latest number of Appeal Cases contains an opinion handed down by him last July. It is the hope of LAW NOTES that all three of these distinguished members of our profession will have many years of usefulness before them to give to younger generations the fruits of their long experience and great abilities.

New Phases of an Old Problem.

MUCH to the delight of the lay critics of the legal profession, the McNamara trial has developed some new phases of the old problem of the right of a lawyer to defend a client whom he believes or knows to be guilty. Caustic and facetious comments on "lawyer logic" and "legal ethics" have appeared in the daily press with reference to the course pursued by the counsel for the accused after learning of their guilt. In the minds of lawyers of the highest character and most conscientious views of their duties to society and their profession, the question has long since been settled, in so far, at least, as respects the right of a counsel to defend a client whom he merely believes guilty of the charge laid against him. Only three years ago this right was asserted in the code of ethics adopted by the American Bar Association on the recommendation of a committee which included such men as the late Mr. Justice Brewer, Alton B. Parker, ex-Secretary of War Dickinson, Henry St. George Tucker, and Francis Lynde Stetson. The canon of the code is based on the unanswerable ground that were the right not recognized "innocent persons, victims only of suspicious circumstances, might be denied proper defense." In *Johnson v. Emerson,* (1871) L. R. 6 Exch. 367, Lord Bramwell said, with characteristic terseness and vigor: "A man's rights are to be determined by the court, not by attorney or counsel. It is for want of remembering this that foolish people object to lawyers that they will argue a case against their own opinions. The client is entitled to say to his counsel, 'I want your advocacy, not your judgment; I prefer that of the court.'" In the McNamara cases the critics contend, however, that the lawyers for the defense not merely believed but actually knew the guilt of the accused, and that after obtaining such knowledge they allowed the trial to proceed, thereby putting the county to great expense and wasting the defense fund which had been raised by well-wishers of the criminals on the belief that they were innocent. At first blush such circumstances present, it must be admitted, a perplexing problem. A bar society recently went so far as to recommend a rule of ethics prohibiting counsel from defending persons known by them to be guilty. A confession of guilt is not, of course, conclusive evidence. The defendant may be insane, or, though sane and innocent, think he has no chance to escape and that a confession will result in a lighter sentence than he would otherwise receive. A disbelief in the genuineness of the confession would in such contingencies be a sufficient reason for the continuance of the defense. No such disbelief, it may be presumed, existed in the mind of the attorneys for the McNamaras. They evidently were striving to secure, if possible, the acquittal of men whom they knew to be dangerous enemies of society. But, let us ask the critics, what other course could these lawyers take until the accused were ready to plead guilty? We know, the critics say, that the lawyer is supposed to owe a duty to his client not to give away the latter's secret, but, in such a case, should he not, they ask, recognize a duty to society in general superior to that to his profession? Whatever may be said in support of such a view, it is a sufficient answer in defense of Mr. Darrow and his associates that the law of the land does not at present impose any such obligation on the lawyer; in fact, it prevents him from observing it. Disclosures on the witness stand of confidential communications between lawyer and client are forbidden by the rules of evidence. It is not merely a technical rule, but is supported by the natural reluctance of man to a breach of confidence ever to be justified by higher obligation to the confessor. The knowledge Mr.

ciates had obtained was in short useless to the State until their clients permitted it to be divulged. If the attorneys for the defense had thrown up the case, the McNamaras would have had the right to keep their mouths shut to others and to call to their assistance lawyers who believed them innocent, or at least did not know them guilty. It can therefore scarcely be said to be a dilemma in which counsel for the prisoners were placed. Under the law of the land there was only one course open to them.

Effect of Plea of Guilty.

HAD the trial of the now notorious J. B. McNamara been held in New York, New Jersey, or Michigan, it would not have been immediately terminated by a plea of guilty. The New York Penal Code provides that "a conviction shall not be had upon a plea of guilty where the crime charged is or may be punishable by death." In New Jersey the statutory provision is that if upon arraignment a person indicted for murder offers a plea of guilty such plea shall be disregarded and the plea of "not guilty" shall be entered. In Michigan the judge is required, even in other than murder trials, to ascertain by a search of the evidence and a personal examination whether the plea was voluntarily entered. The New York statute came up for construction in *People* v. *Smith,* 78 Hun 180. Smith was indicted for murder in the first degree. After a plea of not guilty and a trial thereon the jury disagreed. Subsequently he pleaded guilty to manslaughter in the second degree and was sentenced to ten years imprisonment. On an appeal from the dismissal of a writ of habeas corpus wherein it was argued that the sentence was invalid because of the foregoing section of the Penal Code, it was held that the provision did not apply to a conviction of a crime punishable by a term of years.

The Pardoning Power Again.

SOMEWHAT over a year ago we had occasion adversely to criticise what appeared like an abuse of the pardoning power by a governor of a Southern State. It is our pleasure this month to join in the expressions of approval which have been called forth by the firm stand taken by Governor Mann of Virginia in refusing to interfere with the course of justice in the Beattie case. It did not require the confession of the accused to justify the governor's action in the minds of all those to whom the speedy, impartial, and firm administration of law is a matter of paramount importance. That confession has, fortunately, however, deprived even the sentimentalists of any ground for protest. From its very nature the proper limits of the pardoning power are difficult to define. To use a common expression, "it all depends upon circumstances." Of it Hamilton wrote, in *The Federalist,* as follows: "Humanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little as possible fettered." It is certain, however, that it is to be used only on extraordinary occasions, when it is apparent, in the light of some newly discovered evidence or other unusual contingency, that the other parts of the machinery of justice have failed to perform their functions. The pardoning power is not given to an executive to enable him to execute his judgment in opposition to that of the courts, or to give him an opportunity his opinion on the advisability

A Valuable Report.

THE report of a committee of the Institute of Criminal Law and Criminology on the ever interesting and perplexing question of the relation of insanity to criminal responsibility has been published recently in the journal of the Institute. The committee finds that the dissatisfaction which exists regarding the trial of the issue of insanity in criminal cases has arisen in part because the present popular and medical views and theories regarding insanity are very modern. Although the "right and wrong test" and "the delusion test" laid down in McNaghten's Case represented the medical theories at that time, the views of the medical profession have been continually changing and the old theories have been discarded. "The result," the committee finds, "is that to-day the legal test of insanity is in sharp conflict with the views of the medical profession. . . . The popular idea is that insanity is a definite, clearly defined state with a sharp line of cleavage separating it from a state of sanity. To the physician, insanity means nothing but mental derangement, as general a term as physical soundness. . . . The problem is to connect the physician's diagnosis of the mental condition of a particular individual with the legal tests of criminal responsibility." Inasmuch as a crime at common law consists of a criminal act done with a criminal intent, the committee is of the opinion that when mental derangement is set up as a defense the question is not whether the accused is insane, but whether by reason of the particular mental disease from which he was suffering he lacked the intent necessary to the crime with which he is charged. As to the proper trial of this issue, neither the English statute of 1883, which has been re-enacted in substance in Indiana, Nebraska, Massachusetts, Rhode Island, South Dakota and Hawaii, nor the statute proposed by the New York State Bar Association in January, 1911, has the complete approval of the committee. The fundamental defect of the English statute, in its opinion, is that it makes insanity at the time of the commission of the act the ground for confinement after the trial. The same defect is also found in the proposed New York statute. In addition thereto the form of the proposed verdict is considered to be contradictory and misleading, and the committee objects to the provision that one found "guilty, but insane," shall be sentenced to a State asylum for a definite number of years, the ground of objection being that "the party, by the terms of the statute, is not criminally responsible and is consequently not a fit subject for punishment. The statute merely substitutes the asylum for the penitentiary as a place of imprisonment." Its exhaustive study of this difficult subject has led the committee to recommend that the legal tests of insanity for determining criminal responsibility be abolished; that insanity should be held to be a good defense whenever it negatives the necessary criminal intent; that the various medical associations should formulate a code of professional ethics for medical experts; that the bar association should establish a code of professional ethics for counsel in trials wherein the defense of insanity is raised; that medical expert witnesses should be chosen from a qualified group, and that a statute be enacted into law as follows: "(1) Where, in any indictment or information, any act or omission is charged against any person as an offense, and it is given in evidence on the trial of such person for that offense that he was insane so as not to be responsible

according to law for his actions, at the time when the act was done or omission made, then if it appears to the jury before whom such person is tried, that he did the act or made the omission charged, but by reason of his insanity was not responsible according to law, the jury shall return a special verdict that the accused committed the act or made the omission charged against him, but was not responsible according to law, by reason of his insanity, at the time when he did the act or made the omission. (2) When such special verdict is found, the court shall remand the prisoner to the custody of the proper officer and shall immediately order an inquisition by the proper persons to determine whether the prisoner is now insane so as to be a menace to the public health or safety. If the persons who conduct the inquisition so find, then the judge shall order that such insane person be committed to the State hospital for the insane, to be confined there until in the opinion of the proper authorities he has recovered his sanity and may be safely dismissed from the said hospital. If the members of the inquisition find that the prisoner is not insane as aforesaid, then he shall be discharged from custody. (3) That when an insane person shall have been committed to the State hospital for the insane in accordance with the provisions of the preceding section, no judge of competent jurisdiction shall issue a writ of habeas corpus for the release of such person on the grounds that he is no longer insane, unless the petitioner for such writ presents sufficient evidence to establish a *prima facie* case of sanity on the part of the person confined as aforesaid. Or, (3) that when an insane person shall have been committed to the State hospital for the insane in accordance with the provisions of the preceding section and a writ of habeas corpus has issued for the release of such person, upon the hearing of which writ such person has not been released from confinement, then no judge of competent jurisdiction shall issue a writ of habeas corpus for the release of such person on the ground that he is no longer insane, unless the petitioner for such writ presents to the judge as aforesaid evidence sufficient to show that the mental condition of the person confined has improved since the hearing upon the first writ, so as to render it probable that he is sufficiently sane to justify his release from the asylum." The proposed statute should receive the earnest consideration of lawyers and medical experts throughout the country.

JAMES COCKCROFT.

MANY striking careers have been evolved in the field of American law publishing, but none more full of human interest than that of James Cockcroft.

For more than forty years his position in the law book world was of that prominence which pertains to real achievement alone. His death on November 12, 1911, at his home in Northport, near the publishing house which he had founded, removed a figure unique in his times and often commanding in his special field.

James Cockcroft was born in New York city on September 2, 1842. He was of English ancestry, and the persistence of purpose so often observed throughout his career may be attributed to a mingling of Yorkshire blood and that of the Knickerbocker Dutch stock. His grandfather, Dr. James Cockcroft, was one of the best known of American physicians and is still remembered by old New Yorkers. His father, John Cockcroft, lived for many years at Ossining, N. Y., where young James spent much of his youth. After attending the Peekskill Academy he began his legal education at Columbia University, but was early trained to the law book business in the publishing house and book store of his uncle, John Voorhees. In 1867 he was married to Miss Alida T. Ketcham, who, with two sons, survives him. In 1868, attracted by the opportunities of the growing West, he went to Chicago and entered into partnership with James Callaghan, forming the firm of Callaghan and Cockcroft. By 1871 this firm had become the leading one of the West and had brought out books still cherished by the bar, among them the first editions of Dillon on Municipal Corporations and High on Injunctions. The great fire of that year wiped out all the property of the young publishing house, and Mr. Cockcroft returned to New York, the Chicago business being revived by the firm of Callaghan and Company, with a success which the great concern bearing the name exemplifies. After a short but active publishing career in New York, declining health compelled him to seek rest and quiet in the country, and it was at the little Long Island village of Northport, nestling at the foot of hills along the shores of a beautiful bay, that he regained his strength. There the great work of his life began. His early experience had given him the needed business training, while now his keen insight into the needs of the legal profession and his genius for executing his own plans brought him both fame and fortune.

He founded in 1881, with his friend Edward Thompson, the publishing house at Northport which, although it never bore his name, in every step of its activities felt his guiding hand. Pressing through varying fortunes and with limited resources, he conceived and published books which soon placed the new house in a position for the supreme undertaking of his career — a work which will keep his name in grateful remembrance by all lawyers whose labors it has lightened and whose convenience it has served. The first volume of the *American and English Encyclopædia of Law* was published in 1887. On this work he labored not only as publisher but as editor and author. With his own pen he wrote a considerable part of the early volumes. The difficulties he encountered are described in his remarks in responding to a toast at a dinner tendered him by a large number of judges and prominent lawyers in Chicago in 1895: "It was in sheer desperation that I began work on the first volume. When I think of the failures I experienced in the course of my efforts to get lawyers of note to interest themselves in my plan, I am surprised that I was able to persevere in it myself. Almost every one I talked with was of the opinion that the encyclopædic method was totally unsuited to the science of jurisprudence. In vain I urged the success of that method in dealing with other modern sciences. And when at last I persuaded a few to help me they could not arrange their matter in a manner conformable to my plans. I was fairly driven to do the best I could for myself."

He lived to see the system of legal exposition which he had invented recognized as a genuine boon to the profession, and the books which he had struggled to produce among the most prized and most used volumes in the libraries of the law. In later years his plans were executed by others, and the leisure which he had earned was

largely spent in travel and in the quiet of his splendid private library. In the intervals of nearly a score of trips abroad he found time to edit with rare scholarship an edition of Lord Campbell's Lives of the Chief Justices of England. In 1909 he was a passenger on the steamship Republic when that vessel met with a collision accident which sent her to the bottom. The shock of that disaster and the attending hardship left his health impaired, and when the end came two years later, it was not unexpected. He was an Episcopalian in his religious belief and a staunch Republican in politics. Yachting and fishing were his principal recreation, and at the time of his death he was one of the oldest members of the New York Yacht Club.

It was impossible that a career so long, so prominent, so positive as that of James Cockcroft should not have provoked strife. Like all strong men, he was firm in his convictions. His courage was equal to his insight. His likes and his dislikes were never concealed, and he was strikingly indifferent to the opinions or utterances of an antagonist. He was always frank of expression, and he respected this quality in others. But his nature was a kindly and lovable one. His charity was broad, and his sympathy in daily life was ever extended in a very practical way to the suffering and unfortunate.

FIRST CRIMINAL APPEAL BEFORE HOUSE OF LORDS.

ADVOCATES of a flexible procedure, and especially those who, like Senator Root, believe that the judges should be vested with wide discretionary powers in prescribing rules of practice, will find much to interest them in *Rex* v. *Ball*, [1911] A. C. 47. The case is interesting in the first instance as the first criminal appeal, in the strict sense of the word, to come before the House of Lords. The right of appeal in criminal cases, as is well known, has existed in England only since the passing of the Criminal Appeal Act of 1907, although it is true that points of law were brought before the higher courts, formerly by a writ of error, and under the modern practice by a stated case. The statute of 1907 not only established a Court of Criminal Appeal, but provided that if in any case the director of public prosecutions or the prosecutor or defendant obtains the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought, he may appeal from that decision to the House of Lords. When, however, this provision was taken advantage of in Ball's case, the court and counsel were confronted with the difficulty that no rules had been made governing the taking of such appeals, and the House of Lords was, of course, without any rules in respect to them. On the lodging of the certificate of the Attorney-General provided for in the act, the law lords were consulted. It was ordered that the appeals should be prosecuted subject to such standing orders as might be applicable thereto, and both sides were ordered to appear at the bar of the House on the following day, when counsel for the Crown (appellant) asked for directions as to the filing of documents. Lord Chancellor Loreburn said: "In regard to the papers, I imagine what we want is the materials which were before the Court of Criminal Appeal, and we need not put the parties to the expense and trouble of printing." The papers referred to were (1) printed petition of appeal to the House of Lords embodying the order appealed from and the certificate of the Attorney-General; (2) copy of depositions; (3) copy of exhibits; (4) lists of exhibits; (5) the indictments; (6) transcript of proceedings, including the evidence and the argument at the trial before Scrutton, J.; (7) notice of appeal; (8) certificate of Scrutton, J., and (9) transcript of the judgment of the Court of Criminal Appeal. In the certificate of Scrutton, J., the point of law to be argued was concisely stated as follows: "The question to be raised is as to the admissibility on a trial for acts of incest on specified days in 1910, of evidence of the previous relations of the parties from 1907, including acts of sexual intercourse resulting in the birth of a child in 1908." The papers having been placed before the House, and the arguments of counsel heard, the court on the same day arrived at the conclusion that the evidence in question was admissible, and reversed the order of the Court of Criminal Appeal, which had directed a verdict of acquittal to be entered. The dates of the various steps in the proceedings are interesting. The defendants were tried and convicted on Oct. 14, 1910. On Oct. 31 following, the arguments on the appeal were heard and on Nov. 8 judgments rendered thereon. The appeals to the House of Lords were immediately lodged and on Nov. 28 the order for the appearance of counsel made. On the following day the directions above referred to were given, and on Dec. 15 the point of law was argued and judgment rendered. The case is perhaps even more interesting as an example of liberal statutory construction than as a lesson in procedure. The judgment of the Court of Criminal Appeal had quashed the conviction. It was thereupon held that the court had no power to keep the accused in custody or on bail pending the appeal to the House of Lords. After the reversal of the Court of Criminal Appeal by the House of Lords, an application, on behalf of the Crown, was made to the former court for an order restoring the conviction. It was contended on behalf of the defendants that the court was without power to render such an order. The court, however, was of a contrary opinion, Lord Alverstone, C. J., almost naively saying with reference to the defendants' contention: "If that were correct the result would be serious, because the effect would be to allow a guilty person to go free. It would require very clear words to support such a contention. The language of section 1, subsection 6, seems to us to negative it. The appeal to the House of Lords under that subsection is not, as has been suggested, provided solely for the purpose of obtaining guidance in future cases. An appeal is allowed if the Attorney-General gives his certificate that the decision of this court involves a point of law of exceptional public importance and that it is desirable that a further appeal should be brought. So far as some principle may be laid by the House of Lords, no doubt the decision will be a guide in future cases, but it can only be a guide in cases where the circumstances are similar. The decision itself is a decision in the particular case. . . . In these circumstances it seems to us that the conviction has been in effect restored by virtue of the decision of the House of Lords, and we have power to give effect to that decision by directing that the original appeal be dismissed, and the conviction be restored, and we make an order directing the record to be amended in accordance with the decision of the House of Lords. The defendant who has surrendered will remain in custody, and a warrant will be issued under section 9 for the arrest of the female defendant."

W. K. P.

"JUST as the clavicle in the cat only tells of the existence of some earlier creature to which a collar-bone was useful, precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten." Holmes, The Common Law, Lecture I. (p. 35).

STORIES FROM THE LAW REPORTS.

In re Neagle.

THE *cause célèbre* of *In re* Neagle, 135 U. S. 1, was the last phase of an episode linking battle, murder, and sudden death, as thrilling and dramatic as any that the reports touch upon. Nearly a quarter of a century ago those matters furnished a subject for wide newspaper comment, and even to-day they are a burning topic among certain individuals of a generation that is fast passing. Within a year there has been published a volume[1] wherein the Neagle episode has been cleverly spun into a very readable story.

The principal *dramatis personæ* of this history were Mr. Justice Field, sometime justice of the United States Supreme Court; Mr. Justice Terry, of the Supreme Court of California, and an otherwise obscure individual named Neagle. Others played less important parts, among whom were Mr. Justice Sawyer, of the United States Circuit Court, and State Senator Broderick of California. And there was, of course, a woman in the case. Singularly enough Terry, Neagle, and Broderick all bore the prænomen of David, and Judge Field's father's name likewise was David. Perhaps with so many Davids in the case a conflict was inevitable. When the necessity arose David Neagle re-enacted the part of the David of the proverb, whom he resembled in courage as well as in stature compared with the Goliath Terry.

Judge Field was born in Haddam, Conn., in 1816. He was a descendant of a long line of New England Puritans, many of whom became famous, and all of whom were intellectual. He was born to culture and refinement. His father, David Dudley Field, of Haddam, Conn., and Stockbridge, Mass., was a clergyman of eminence and a man respected for his learning, calm wisdom, and strength of character. The judge was endowed of the same cool, calm mind — an attribute of a highly civilized race. His brothers, David Dudley Field and Cyrus W. Field, distinguished themselves, the former as a law reformer and the latter as a financier and projector of the first cable connecting the Western with the Eastern world. Physically the judge was a very large man — tall, broad, and powerful, although of the Puritanical spareness. It has been said that Judge Field lacked physical courage, but there is abundant evidence to disprove this. Throughout his sojourn in California and Nevada in the turbulent times, when it was thought folly to go unarmed, he never but once — when making a long journey through a wilderness — carried a weapon upon his person, or even was possessed thereof.

Judge Terry resembled Judge Field physically, but here the similitude ended. The former's ancestors were Virginians, but at an early age Terry had gone to Texas, where he fought with desperate courage under Sam Houston in the Texan war of independence. He took a conspicuous part in the Mexican War, and he fought throughout the Civil War as a Confederate officer, winning distinction for his dashing bravery. He was a real warrior, bold and resolute, and courageous in the face of death to a degree rarely found among civilized peoples. He should have been a gladiator armed with buckler and dagger. In height he was well over six feet, and his mighty chest, arms, and neck truly indicated immense strength. His temper was violent and ungoverned, and he was easily provoked to a lawless fury. Indeed his acts show him to have been "sudden and quick in quarrel," and as revengeful as a Sicilian. He was a principal in numerous pistol duels, incidents that were common enough upon the border of the States in the early days. While Judge Terry may not have been a "border ruffian," he was, to the mind of an effete Easterner, a lawless and perhaps desperate character. His achievements as a "gun fighter" won him an enviable (?) reputation; and he was skilled in the use of the bowie knife, a weapon which he habitually carried upon his person. There must always be in the American mind a prejudice against the use of knives as weapons of offense. The knife is not the weapon of an American.

It is recorded of the character depicted as Tower in Mr. Hart's romance that in his early days in Texas he took part in a duel that was fought with knives in a rather uniquely barbarous manner. The principals in this *affaire d'honneur* (?) were taken separately by night to an uninhabited island in the Mississippi river. Each was armed only with a knife. The idea was that the participants in this picturesque little nocturne *à deux* were to play hide and seek with each other in the dark, the knives being used when conditions permitted. The advantages of a duel fought under such circumstances obviously are that it dispenses with any question of fair play or the nuisance of seconds, surgeons, and the other paraphernalia that are thought to be necessary under modern conditions. The occurrence of death is reduced to a certainty. At daybreak the seconds returned to the island, and there found Tower not far from the body of his antagonist. The former was unruffled, although he had not escaped injury; the latter had been dead some hours, having received a succession of knife thrusts, any one of which would have proved fatal.

Field and Terry both arrived in California in the days of the gold fever. They both practiced law, and both entered into politics, rapidly becoming the respective leaders of the factions into which the Democratic party was divided. Field acquired control of the faction which stood for the abolition of slavery, and consequently included in its adherents men from the Northern States; while Terry became the leader of the pro-slavery wing, which was composed of Southerners. It has been said that Terry allied himself with the disorderly and lawless element, to suppress which the Vigilantes were called into being, and that it was to this following that he owed his election to the Supreme bench. Politics in California at that time were not noted for cleanliness and freedom from corruption. One of Judge Field's political lieutenants was "Dave" Broderick, who was not beyond reproach in his methods of acquiring prestige. Broderick was born in Washington, his father having been a poor Irish laborer. He drifted to New York, became a saloonkeeper, and identified himself with the politicians who made Tammany a name of reproach in those days. He became a shrewd, ambitious politician, and the lessons in practical politics which he learned while in New York stood him in good stead in California, where he was elected State senator.

David Terry was elected justice of the Supreme Court of California in 1855, and resigned on Sept. 12, 1859. Stephen J. Field was elected a justice of the same court in 1857, and became chief justice upon Judge Terry's resignation. So these men were associates upon the bench during two years. Their relations during this time seem to have been amicable enough; had they not been, history probably would have recorded some act of violence on the part of Judge Terry.

Judge Terry resigned from the bench to take part in the Civil War. He was not the man to miss an opportunity to take part in a conflict. After the war was concluded he returned to California and engaged in the practice of the law. In the meantime Judge Field had been appointed by President Lincoln an associate justice of the United States Supreme Court.

One of the incidents in Judge Terry's life, which made him conspicuous, was a quarrel with David Broderick. It seems that Broderick was the aggressor in this case. The men had been rival candidates for the office of State senator, and it is said that they also were rivals for the hand of a certain woman. In the former contest Broderick had prevailed, but in the latter Judge Terry seems to have had an advantage over his rival.

[1] Hart, Jerome. Vigilante Girl. Chicago, McClurg, 1910.

At any rate the men bore each other a grudge, and Senator Broderick publicly applied the short and ugly word to Judge Terry. A duel with pistols was arranged, and Judge Terry's friends were very apprehensive over the outcome. Broderick, like nearly every man who had been a "Forty-niner," knew how to use a pistol, and he had the reputation of being a very quick and sure shot. The meeting and its consequences are described by Mr. Hart as follows: "When ordered by the seconds to take position, Tower at once placed himself. His soft black hat was pushed back on his head, revealing his eyes plainly. He stood erect, and firmly planted on his feet; his body was adjusted with accuracy, sidewise to his opponent; his right arm hung naturally and easily by his side; his pistol was exactly vertical. He looked the embodiment of strength, courage, and determination. When Burke's [Broderick's] seconds directed him to take position his manner was exactly the reverse. His face was pale, and there were deep shadows under his eyes, betokening a sleepless night. His black slouch hat was already well forward, and as he took position he pulled it further forward over his eyes. The nervous strain under which he was laboring was evidenced by the stiffness of his movements and the tenseness of his muscles. When the seconds asked each man if he was ready, Tower quickly answered in a firm voice, 'I am ready.' For some moments Burke did not reply, and when he did, he uttered the word 'Yes,' following it a moment later with a nod. The moment Burke spoke, Colquhoun started forward, crying 'Stop!' When asked the reason he volubly replied, pointing out that Burke was not holding his pistol vertically, as the terms required, but that it was pointing outward at an obtuse angle. This could not be controverted. Burke's seconds hastened to his side in order to remedy this unconscious infringement. So great was the tension of Burke's muscles that it was only with an effort that he could force the pistol-hand into the proper position, and permit the pistol to point downward. In doing so his muscles were so tense that he wrenched his body a little out of the perpendicular, and threw his left side slightly forward; thus his chest presented a large mark to Tower's pistol. His seconds did not notice this departure from the position in which they had so carefully placed him. Nor did he — he was smarting under the conduct of Colquhoun. As Burke's side had won the word, Holton was the one chosen to give it. Before doing so, he proceeded to exemplify the word and the time between its syllables, as set forth in the agreement, in order that the principals might clearly understand it. This he did deliberately and with exceeding care. As the brief interval between the syllables '*Fire — one — two*' was noted, little undulations ran through the spectators, as they kept time with their bodies.

"'Good God! That's awful short firing time,' said Brewer, doubtfully, 'or so it seems to me. How does it strike you, Yarrow?'

"'It means pretty quick firing,' admitted Yarrow. 'But I suppose it's long enough. It sounds to me like the striking of a cathedral clock.'

"When Holton was sure that both principals thoroughly understood the way he gave the word, the seconds took their places. The spectators could no longer restrain themselves — a kind of hoarse murmur arose from the two groups of excited men. Colquhoun warningly waved his hand to them to be quiet.

"'Gentlemen, are you ready?' asked Holton.

"'Ready,' instantly replied Tower.

"'Yes,' slowly answered Burke.

"Pausing, and looking first to one and then to the other, Holton said, slowly and deliberately:

"'Fire — one — two.'

"As the word 'One' fell from Holton's lips, Burke fired. It would be more exact to say that his pistol went off. He had partly elevated his weapon, but it was discharged before it reached a level line. His bullet entered the ground some nine feet from where he stood, making a line shot.

"Just before the word 'Two' the crack of Tower's pistol came. Exactly as Tower fired, a patch of dust spattered out near the left lapel of Burke's black coat.

"As Tower's pistol sounded, Burke's right arm, which was still extended, was flung up in the air almost perpendicularly. In his right hand he still grasped the pistol. A shuddering began in the chest, running out to his extremities; the fingers relaxed, the hand trembled, the pistol dropped to the ground. The shuddering grew heavier; his head drooped; his knees doubled under him; his body sank slowly; he strove to prop himself up with his left arm, but he had not the strength, and in a moment his limp body was lying on the ground. His seconds rushed to his side, and beckoned to his surgeon, Dr. Lehrter. But it was soon evident that the situation was too much for him, and he was obliged to call for assistance from the surgeons on the other side.

"Tower remained standing in his place with folded arms, his pistol-barrel resting across his left elbow. When his seconds came to him he remarked:

"'I suppose we had better remain until we learn whether a second shot will be demanded by the other side.'

"Colquhoun shook his head. 'Burke will never fire another shot, judge,' he said. 'His wound is mortal.'

"'I do not think so,' replied Tower. 'I hit him too far out for a mortal wound. I think the ball only crashed through the ribs. It is not a dangerous wound.'

"But the news soon came from the other side, through DeKay, who had been there to make inquiries. He informed Tower that Burke had been shot through the lungs.

"'There is no hope for him,' he said. 'The three surgeons are unanimously of the opinion that his death is near at hand.'"

A number of years elapsed before the occurrence of the incidents chronicled in the next chapter of this eventful history. Sarah Althea Hill, like Terry, Field, and Broderick, went to California in the early days. She was a Southerner, and had lived chiefly in St. Louis and New Orleans. It has been said that it was she who was the real cause of the Broderick-Terry quarrel. She had been the *protégée* of the aged and very wealthy ex-Senator Sharon, of Nevada. Sarah Althea asserted that she was his wife, basing the claim upon a writing purporting to be a declaration of marriage between them. On Oct. 3, 1883, Senator Sharon commenced a suit in the United States Circuit Court for the District of California to have the writing declared to be a forgery and of no force or effect. This suit was heard by Judge Sawyer, Circuit Judge, and Judge Deady, District Judge, who, on the 15th of January, 1886, rendered a decree granting the prayer of the bill. The court further ordered that the writing be delivered to the clerk of the court to be indorsed "canceled." In the meantime the complainant had died, and Sarah Althea married Judge Terry. Nothing was done under the decree, and on March 12, 1888, the executor of Senator Sharon filed a bill of revivor, making Sarah Althea and her husband parties defendant.

Sarah Althea's gentle femininity is exhibited by an occurrence in course of the proceedings in the original suit brought against her by Senator Sharon. During the proceedings before the examiner in chancery, Sarah Althea, the respondent, who was in attendance and engaged in reading the deposition of one of the witnesses, became greatly excited. The reporter's notes showed the following dialogue:

The Respondent — I won't sign my deposition unless it contains everything that I said about Stewart's family. He don't

dare to take me up on it. I won't sign that evidence unless that is put in.

The Examiner — Don't talk about it now.

The Respondent — It has got to go in.

The Examiner — This is no proper time for bringing up any matter of that kind. A witness is under examination.

The Respondent — When I see this testimony I feel like taking that man Stewart out and cowhiding him. I will shoot him yet — that very man sitting there. To think he would put up a woman to come here and deliberately lie about me like that! I will shoot him. They know when I say I will do it that I will do it. I shall shoot him as sure as you live — that man that is sitting right there; and I shall have that woman, Mrs. Smith, arrested for this, and make her prove it.

The Examiner — Those are not matters which should be brought up now. Don't talk in this way when a witness is under examination.

The Respondent — I say no jury will convict me for shooting a man that will bring a woman here to tell such things on me. They have never dared, when they put me on the stand, to ask me a question against my character yet — never dared. If they have got so much against it, why didn't they dare ask me some questions when I was on the stand?

The Examiner — Mr. Tyler, can you put a stop to this? I find that I cannot, and unless you can, I shall have to adjourn the examination and bring this matter to the attention of the court. This thing has gone altogether too far already, and unless it can be stopped here, I certainly shall adjourn the examination.

Mr. Tyler — Let us get through this afternoon, anyway.

The Respondent — I know the woman he is living with, and he brought his wife out here to cover it up. I will expose the whole thing, about the child and all.

The Examiner — Will you remain quiet until this examination is completed?

The Respondent — I don't know whether I will remain quiet without I get that man's life. I get so worked up when I read this testimony of Mrs. Smith.

The Examiner — Let me take that testimony until after the examination is over.

The Respondent — I expect you had better.

The Examiner — You may finish reading Mrs. Smith's testimony after the close of the session. I hope, now, I shall not be compelled to bring your misbehavior to the attention of the court, for if I should do so, the court will surely punish you for contempt.

The Respondent — That would be nothing unusual if Stewart asked it.

The Examiner — I shall ask it in this instance, because my duty compels me to do so. You persist in interrupting the proceedings, and it is impossible for the examination to go on. If you will wait until we get through with this examination, if you have anything to say, then it will be a more appropriate time to say it.

The Respondent — I can hit a four-bit piece nine times out of ten.

The Examiner — If you interrupt the proceedings any further, I shall adjourn the examination and call the attention of the court to this matter, and it won't be my fault if the court does not take such measures as will put a stop to such interruptions. I have at all times been disposed to be as tolerant and lenient with you as possible, but toleration should have a limit, and the limit has been reached. Early in the proceedings the court suggested that I ought to be very lenient with you, and in conformity to that suggestion, as well as my own inclination, I have treated you with the greatest consideration and forbearance all through.

The Respondent — That is enough; you needn't say anything more.

The Examiner — But I propose to say something more.

The Respondent — All right; then I'll talk.

The Examiner — Since the commencement of the examination in this case, your offensive conduct has frequently disturbed the orderly course of the proceedings, and I have tried in every way which my imagination could suggest to check you — by considerate treatment, by ignoring your misbehavior, by courteous protest and persuasion, by rebuke, by appeals to your counsel, by threatening to report your conduct to the court. But, instead of abating, the evil is constantly growing worse. Now this thing must stop.

The respondent ceased speaking at this point, and the examination proceeded. Shortly thereafter the respondent drew a pistol from her satchel and held it in her right hand, the hand resting for a moment upon the table, with the weapon pointed in the direction of counsel for complainant, who, noticing her act, said: "What do you want? Do you want to shoot anybody?" To this Sarah Althea replied: "I am not going to shoot you just now, unless you would like to be shot, and I think you deserve it." Counsel disclaimed any desire to be made a target.

To the bill of revivor filed by Senator Sharon's executor, the defendants, Sarah Althea and her husband Terry, demurred and answered, and the case was argued in the Circuit Court before Field, Circuit Justice; Sawyer, Circuit Judge; and Sabin, District Judge. While the matter was held under advisement, Judge Sawyer, on returning from Los Angeles, in the Southern District of California, where he had been holding court, found himself on the train as it left Fresno, which is understood to have been the residence of Terry and wife, in a car in which he noticed that Mr. and Mrs. Terry were in a section behind him, on the same side. On this trip from Fresno to San Francisco, Mrs. Terry grossly insulted Judge Sawyer, and had her husband change seats so as to sit directly in front of the judge, while she passed him with insolent remarks, and pulled his hair with a vicious jerk, and then, in an excited manner, taking her seat by her husband's side, said: "I will give him a taste of what he will get by and by. Let him render this decision if he dares" — the decision being the one already mentioned, then under advisement. Terry then made some remark about too many witnesses being in the car, adding that "the best thing to do with him would be to take him out into the bay and drown him." This was Aug. 14, 1888. On the 3d of September the court rendered its decision granting the prayer of the bill of revivor in the name of Frederick W. Sharon and against Sarah Althea Terry and her husband, David S. Terry. The opinion was delivered by Mr. Justice Field, and during its delivery a scene of great violence occurred in the courtroom. It appears that shortly before the court opened on that day, both the defendants in the case came into the courtroom and took seats within the bar at the table next the clerk's desk, and almost immediately in front of the judges. Besides Mr. Justice Field there were present on the bench Judge Sawyer and Judge Sabin.

The defendants had denied the jurisdiction of the court originally to render the decree sought to be revived, and the opinion of the court necessarily discussed this question without reaching the merits of the controversy. When allusion was made to this question Mrs. Terry rose from her seat, and, addressing the justice who was delivering the opinion, asked in an excited manner whether he was going to order her to give up the marriage contract to be canceled. Mr. Justice Field said: "Be seated, madam." She repeated the question, and was again told to be seated. She then said, in a very excited and violent manner, that Justice Field had been bought, and wanted to

know the price he had sold himself for; that he had got money for it, and everybody knew that he had got it, or words to that effect. Mr. Justice Field then directed the marshal to remove her from the courtroom. She asserted that she would not go from the room, and that no one could take her from it. The marshal proceeded to carry out the order of the court by attempting to compel her to leave, when Terry, her husband, rose from his seat under great excitement, exclaiming that no man living should touch his wife, and struck the marshal a blow in his face so violent as to knock out a tooth. He then unbuttoned his coat, thrust his hand under his vest, apparently for the purpose of drawing a bowie-knife, when he was seized by persons present and forced down on his back. In the meantime Mrs. Terry was removed from the courtroom by the marshal, and Terry was allowed to rise and was accompanied by officers to the door leading to the marshal's office. As he was about leaving the room, or immediately after being out of it, he succeeded in drawing a bowie-knife, when his arms were seized by a deputy marshal and others present to prevent him from using it, and they were able to wrench it from him only after a severe struggle. The most prominent person engaged in wresting the knife from Terry was David Neagle. For this conduct both Terry and his wife were sentenced by the court to imprisonment for contempt, Mrs. Terry for one month and Terry for six months, and these sentences were immediately carried into effect. From that time until his death the denunciations by Terry and his wife of Mr. Justice Field were open, frequent, and of the most vindictive and malevolent character. While being transported from San Francisco to Alameda, where they were imprisoned, Mrs. Terry repeated a number of times that she would kill both Judge Field and Judge Sawyer. Terry, who was present, said nothing to restrain her, but added that *he* was not through with Judge Field yet; and while in jail at Alameda, Terry said that after he got out of jail he would horsewhip Judge Field; and that he did not believe he would ever return to California, but this earth was not large enough to keep him from finding Judge Field and horsewhipping him; and, in reply to a remark that this would be a dangerous thing to do, and that Judge Field would resent it, he said: "If Judge Field resents it I will kill him." And while in jail Mrs. Terry exhibited to a witness Terry's knife, at which he laughed, and said, "Yes, I always carry that," and made a remark about judges and marshals, that "they were all a lot of cowardly curs," and he would "see some of them in their graves yet." Mrs. Terry also said that she expected to kill Judge Field some day. Many matters of this character were published in the newspapers, and the press of California was filled with the conjectures of a probable attack by Terry on Justice Field, as soon as it became known that he was going to attend the Circuit Court in that year.

So much impressed were the friends of Judge Field, and of public justice, both in California and in Washington, with the fear that he would fall a sacrifice to the resentment of Terry and his wife, that application was made to the Attorney-General of the United States suggesting the propriety of his furnishing some protection to the judge while in California. This resulted in a correspondence between the Attorney-General of the United States, the district attorney, and the marshal of the Northern District of California on that subject, the result of which was that Mr. Neagle was appointed a deputy marshal for the Northern District of California, and given special instructions to attend upon Judge Field both in court and while going from one court to another, and protect him from any assault that might be attempted upon him by Terry and wife. Accordingly, when Judge Field went from San Francisco to Los Angeles to hold the Circuit Court of the United States at that place, Mr. Neagle accompanied him, remained with him for the few days that he was engaged in the business of that court, and entered the train to return with him to San Francisco. While the sleeping car, in which were Justice Field and Mr. Neagle, stopped a moment in the early morning at Fresno, Terry and wife got on the train. The fact that they were on the train became known to Neagle, and he held a conversation with the conductor as to what peace officers could be found at Lathrop, where the train stopped for breakfast, and the conductor was requested to telegraph to the proper officers of that place to have a constable or some peace officer on the ground when the train should arrive, anticipating that there might be violence attempted by Terry upon Judge Field. This resulted in no available aid to assist in keeping the peace.

When the train arrived, Neagle informed Judge Field of the presence of Terry on the train, and advised him to remain and take his breakfast in the car. This the judge refused to do, and he and Neagle got out of the car and went into the dining room, and took seats beside each other in the place assigned them by the person in charge of the breakfast room. The occurrences following hereupon were testified to by Judge Field as follows: "A few minutes afterwards Judge Terry and his wife came in. When Mrs. Terry saw me, which she did directly she got diagonally opposite me, she wheeled around suddenly, and went out in great haste. I afterwards understood, as you heard here, that she went for her satchel. Judge Terry walked past, opposite to me, and took his seat at the second table below. The only remark I made to Mr. Neagle was: 'There is Judge Terry and his wife.' He remarked: 'I see him.' Not another word was said. I commenced eating my breakfast. It seems, however, that he came round back of me — I did not see him — and he struck me a violent blow in the face, followed instantaneously by another blow. Coming so immediately together, the two blows seemed like one assault. I heard 'Stop! stop!' cried by Neagle. Of course, I was for a moment dazed by the blows. I turned my head round, and I saw that great form of Terry's, with his arm raised, and his fists clenched to strike me. I felt that a terrific blow was coming, and his arm was descending in a curved way, as though to strike the side of my temple, when I heard Neagle cry out, 'Stop! stop! I am an officer.' Instantly two shots followed. I can only explain the second shot from the fact that he did not fall instantly. I did not get up from my seat, although it is proper for me to say that a friend of mine thinks that I did; but I did not. I looked around, and saw Terry on the floor. I looked at him, and saw that peculiar movement of the eyes that indicates the presence of death. Of course, it was a great shock to me. It is impossible for any one to see a man in the full vigor of life, with all those faculties that constitute life, instantly extinguished, without being affected; and I was. I looked at him for a moment, then rose from my seat, went around, and looked at him again, and passed on."

Neagle was arrested immediately after the shooting, and subsequently Judge Field was placed under arrest upon a charge preferred by Mrs. Terry. The New York *Herald* of that day contains the following editorial comment upon the events chronicled above: "Justice Field's whole course shows a conception of judicial duty that lends grandeur to a republican judiciary. It is an inspiring example to the citizens and especially the judges of the country. He was reminded of the danger of returning to California while Judge Terry and his wife were at large. His firm answer was that it was his duty to go and he would go. He was then advised to arm himself for self-defense. His reply embodies a nobility that should make it historic: 'When it comes to such a pass in this country that judges of the courts find it necessary to go armed, it will be time to close the courts themselves.' This sentiment was not born of any insensibility to danger. Justice Field fully realized the

peril to himself. But above all feeling of personal concern arose a lofty sense of the duty imposed upon a justice of the nation's highest court. That officer is a representative of the law, a minister of peace. He should show by his example that the law is supreme, that all must bow to its authority, that all lawlessness must yield to it. When judges who represent the law resort to violence, even in self-defense, the pistol instead of the court becomes the arbiter of controversies and the authority of the government gives way to the power of the mob. Rather than set a precedent that might tend to such a result, that would shake popular confidence in the judiciary, that would lend any encouragement to violence, a judge, as Justice Field evidently felt, may well risk his own life for the welfare of the commonwealth. He did not even favor the proposition that a marshal be detailed to guard him. The conduct of the venerable justice is an example to all who would have the law respected. It is also a lesson to all who would take the law into their own hands. Not less exemplary was his recognition of the supremacy of the law when the sheriff of San Joaquin appeared before him with a warrant of arrest on the grave charge of murder. The warrant was an outrage, but it was the duty of the officer to serve it, even on a justice of the United States Supreme Court. When the sheriff hesitated and began to apologize before discharging his painful duty, Justice Field promptly spoke out: 'Officer, proceed with your duty. I am ready, and an officer should always do his duty.' These are traits of judicial heroism worthy the admiration of the world."

SOLICITATION OF BUSINESS BY ATTORNEYS.

THE Chicago Bar Association has appointed a committee to investigate the solicitation of business by attorneys. The members of the committee are Joseph B. Burtt, Chilton P. Wilson, and Delbert A. Clithero. The American Bar Association in 1908, the Illinois State Bar Association in 1910, and the Chicago Bar Association in June, 1910, adopted the following rules of conduct for lawyers:

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship, or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital attachés, or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant, or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred.

The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not *per se* improper. But solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional. It is equally unprofessional to procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer. Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's position, and all other like self-laudation defy the traditions and lower the tone of our high calling, and are intolerable.

THE GARY LAW LIBRARY.

NORTHWESTERN UNIVERSITY has issued a bulletin in which is described in detail the recently acquired Elbert H. Gary library of law. This library is open, without charge, to all lawyers who present satisfactory credentials.

Any person desiring legal advice upon a foreign law may write to the school, stating his case or his question of law; the communication will then be handed for reply to some local legal adviser, having the privileges of the library, and recommended by the appropriate consul as skilled in the language concerned, who will consult the library and will return an answer, charging such fee as may be agreed between himself and the correspondent. For the service the library will charge nothing to either party. Any member of a faculty of any other university may consult the library, or, on proper guarantees, may borrow particular volumes. The library is the gift of Hon. Elbert H. Gary, '67, of New York, and comprises eleven collections as follows:

Modern Anglo-American Law — Includes the modern law as contained in statutes, current session laws, decisions, digests, treatises, collections of leading cases, and journals of the United States, of England, of Ireland, and of Canada; official copies of all the briefs and records filed in cases before the Supreme Court of the United States.

Modern Continental Law — Now numbers some 12,000 volumes on the law of the twenty-three European countries, as contained in statutes, decisions, journals, and treatises; is more comprehensive in scope than any other collection in the United States. This collection is particularly valuable to lawyers having a foreign clientage. It is in constant use by counsel from every part of the United States.

International Law — Numbers nearly 3,000 volumes, and includes a large quantity of printed material relating to American, to British, and to Continental diplomacy.

Ancient, Oriental, Primitive, and Mediæval Law — Includes the Hindu, Mohammedan, Hebrew, Babylonian, Egyptian, Greek, Chinese, Japanese, and sundry other systems, as well as the mediæval European materials. It numbers 14,000 volumes.

Roman and Civil Law — Numbers 2,500 volumes, including the library of the late Moritz Voigt, of Leipzig, Germany, and contains many rare volumes.

Ecclesiastical Law — Numbers 1,500 volumes, containing a selection of the most useful texts, commentaries and journals.

Jurisprudence and Philosophy of Law — Numbers 700 volumes, and includes all the important American, English, German, French, Italian, and Latin texts on this subject.

Criminal Law and Criminology — Now numbers over 2,000 volumes.

Anglo-American Legal History — Will include material relating to English historical legal literature, complete sets of Colonial session laws (mostly reprints), revisions, contemporary and modern treatises on the laws of the colonies, and all

other available material related to the history of the development of the common law in England and the United States. This collection now numbers about 2,500 volumes.

Latin-American Laws — Will include collections of the laws of Mexico, the Central American, and the South American states, following the arrangement in the Gary collections of Modern Continental Law; that is, a collection of the codes, ordinances, decisions of the Supreme Court, of the most important treatises, and of the leading law journals. Thus far the volumes installed number 1,500, and will be increased as rapidly as the material can be acquired.

Legal Bibliography — Numbers some 500 volumes and pamphlets, covering all topics and countries.

SUNSTROKE AS AN "ACCIDENT."

THERE have been of late a series of cases throwing some further light on the attitude which the courts are taking up in regard to compensation claims consequent upon sunstroke. By a coincidence it will be found that in our issue for the 21st Oct. two decisions are noted in which the question has arisen as to whether there had been an "accident," and, if so, whether it had arisen "out of" the employment. A reference to the facts of those cases will show that in each the victim was engaged in performing tasks of abnormal severity having regard to the weather prevailing. In *Davies* v. *Gillespie* (noted *ante*, p. 553) a mate had to superintend the loading of a ship for five hours under a burning sun, and in *Wignall* v. *Watson* (noted *ante*, p. 556) a carter was called on to carry heavy loads of hay under adverse climatic conditions. In each case the death was regarded as due to circumstances involving abnormal risks.

Ever since *Fenton* v. *Thorley*, 89 L. T. Rep. 314, [1903] A. C. 443, was decided, and the widest possible latitude given to the interpretation of the term "accident," much of the casuistry with which the expression was being overladen has tended to disappear. From that decision it may be gleaned as a principle that arbitrary or technical or contractual interpretations are not to prevail over the sense adopted in common everyday parlance. This definition, however, does not seem always and in practice to carry us such a long step forward as might perhaps appear, for the argument is at once advanced that this or that event would not be an "accident" in such popular parlance. When we turn to the dictionaries, we find that the everyday meaning of "accident" is something unforeseen or a casualty, and the latter word is apt to be defined as something fortuitous, or an accident. The interpretation of "accident" is inclined, therefore, to wander in a circle, and we arrive at the unilluminating result that an "accident" must be something "accidental." In effect, therefore, the practitioner is driven back to his cases, and it is in this special connection that the two recent decisions on sunstroke are of so much importance as showing, however the judgments are open to criticism, to what an extent the conclusions are satisfactory.

In the two cases to which we have referred in our opening paragraph there was one point in common, and that was the abnormal work performed in circumstances of a severe climate. In one case it was a prolonged exposure without necessarily any unusual physical exertion — an exposure on a surface in itself exceedingly trying and for a period prolonged on one spot for a period greater than usual. In the other case the victim, under like unfavorable weather conditions, was called upon to carry heavy loads on several occasions, and it may be added that the nature of the loads (hay) did not tend to diminish the severity of the task. It can therefore be said that in each of these cases the unfortunate men concerned were, under the circumstances, running peculiar dangers such as would not be experienced by the ordinary class of sailors or carters.

It may be seen that herein we find the distinction between the decisions in question and cases the type of which is illustrated in *Warner* v. *Couchman*, 103 L. T. Rep. 693, [1911] 1 K. B. 351. The actual accident in that case was the converse of those in the decisions already mentioned. Instead of excessive heat, it was a case of excessive cold, and the injury was frost-bite instead of sunstroke. The victim was a baker, and his trouble was the result of delivering bread in cold weather. So far it is clear that thousands of men of his class were engaged in various employments involving just such risks as those run by the applicant. Every person in the open air on that particular day was exposing his frame to no remote risks. The only point upon which his advisers could fasten as involving him in extra risk was that he took off his gloves frequently for the purpose of giving change. It is, however, not necessary to do so, although it may be convenient, and accordingly it is not surprising that, even assuming the circumstances could be fairly describable as an "accident," there should be difficulty in saying that it arose "out of" the employment. This decision was not arrived at by a unanimous Court of Appeal, for Lord Justice Fletcher Moulton took the view that the act did not say that an accident must arise "out of the applicant's employment and out of that employment only." The learned judge would not consider that the risks of other employments should enter into the consideration when ascertaining whether some accident has arisen out of the applicant's employment.

Another argument in these cases of sunstroke is eliminated by *Ismay, Imrie, and Co.* v. *Williamson*, 99 L. T. Rep. 595, [1908] A. C. 436, for it would appear impossible to rely on an applicant's special physical inability to withstand heat. In that case the death was due to heat-stroke sustained while raking out the ashes from a vessel's stokehold. The victim was in a bad state of health. Notwithstanding this, Lord Loreburn states that "to my mind the weakness of the deceased which predisposed him to this form of attack is immaterial. The fact that a man who has died from a heat-stroke was by physical debility more likely than others so to suffer can have nothing to do with the question whether what has befallen him is to be regarded as an accident or not." Here again the innate difficulty of the matter is shown by the fact that a decision on these lines was only carried by a majority of two to one in a court where the minority was represented by so experienced a judge as Lord Macnaghten. He thought that the death was due to the man's physical condition and to the fact that he was absolutely and entirely a novice at the work he was doing. The learned judge would probably have regarded the death as consequent upon a "disease" rather than an "accident" operating on a frame debilitated by poverty and misfortunes, and displaying the known effects of a known cause on a given subject — a state of things outside the unlooked-for or untoward, or the unexpected and undesigned, to make use of Lord Macnaghten's own description in *Fenton* v. *Thornley* (*ubi sup.*).

Further illustrations of the guiding principle as to peculiar risk being so important an ingredient in the consideration whether or not some given sets of circumstances realize the essentials of an "accident" may be obtained in two or three of the analogous cases on lightning. Thus, in Ireland it has been decided that a road-mender so killed while at work was not deprived of life by an accident arising out of his employment. *Kelly* v. *Kerry County Council*, 42 Ir. L. T. 23. Obviously every passenger on the road was liable to have been struck by a flash. On the other hand, *Andrew* v. *Failsworth Industrial Society, Limited*, 90 L. T. Rep. 611, [1904] 2 K. B. 32, was a case where the worker was engaged on a scaffold, and there was a finding of fact that the workman was exposed to an abnormal

risk. Upon this the Court of Appeal held that the accident arose out of as well as in the course of the employment. We may add to this category of cases where there is some unusual risk run by the person injured over and above that of ordinary persons the less-known case of *Morgan* v. *Owners of Steamship Zenaida,* 25 Times L. Rep. 446. There an ordinary seaman sustained sunstroke while painting the outside of the ship under a tropical sun. The Court of Appeal confirmed an award in the man's favor, owing to his being exposed to a peculiar risk from reflected heat.

The decisions are rapidly leading to the conclusion that by means of findings of fact of peculiar risk, acts of God in the form of storms, floods, earthquakes, strokes, and the like, which occasion some physical injury to a person engaged in some work, are liable to be classed as "accidents" arising out of and in the course of the employment. Acts of God, moreover, are not easily classified, for they extend from the region of such events as volcanic upheavals — catastrophes beyond all human power to avert — until they reach strokes which are difficult to differentiate from diseases. The Workmen's Compensation Act 1906, § 8 (10), provides that "nothing in this section shall affect the rights of a workman to recover compensation in respect of a disease to which this section does not apply, if the disease is a personal injury by accident within the meaning of this act." So the application to industrial diseases more particularly specified is not a very clear line of demarcation, and acts of God, diseases, and accidents are confusedly intertwined. Amid so much ambiguity it is not possible to avert argument as to on which side of the line some casualty is to be deemed to fall. The cases to which we have referred throw a useful light on such injuries as those resulting from sunstroke, and indicate circumstances which have in the past led the courts to treat this *quasi*-disease as within the statutory meaning of "accident." The time has not yet arrived when a practitioner can carry in his head a few plain and intelligible principles as the touchstones in this department of law. A series of decisions is evolving some such principles, but the cases will turn always to a great extent on facts, and these will have to be measured against the standard already set up in the reports of earlier cases. — *Law Times* (*London*).

Cases of Interest.

SHORTHAND CHARACTER AS "WRITING." — In Howerton *v.* Augustine, (Ia.) 132 N. W. Rep. 814, it appeared that a certificate attached to the shorthand report of a trial was also in shorthand, and it was held that this was not a sufficient certificate, as shorthand characters were not "writing" within the meaning of a statute requiring such certificate to be in writing.

JUDICIAL NOTICE TAKEN THAT "GREENBACK" MONEY IS LAWFUL MONEY. — In Jones *v.* State, (Ga.) 72 S. E. Rep. 518, wherein the defendant was charged with robbery, the man robbed testified as follows: "I was robbed of $135 of lawful money. It was greenback money, and would pass. It was my individual money, and it was all paper money, greenbacks in fives and tens." It was claimed that there was a variance in this proof from the allegation in the indictment, which charged the robbery of $135 of lawful money. It was held, however, that there was no variance, as the court would take judicial notice that the term "greenback" was the popular name used to designate a certain species of the currency of the United States.

LIABILITY OF HOSPITAL FOR NEGLIGENCE OF AMBULANCE DRIVER HIRED FROM LIVERY STABLE. — In Kellogg *v.* Church Charity Foundation, 203 N. Y. 191, it appeared that the defendant was a charitable corporation maintaining St. John's Hospital, in the borough of Brooklyn, and that the plaintiff was seeking damages for the alleged negligence of a driver of the defendant's ambulance, whereby the plaintiff was run into and injured. The facts brought out at the trial showed that the ambulance was owned by the defendant, and bore the name of its hospital, but was kept at a livery stable, the proprietor of which furnished a horse to draw the ambulance and a man to drive it when needed by the defendant. The driver was hired and paid by the livery stable keeper, who alone had power to discharge him. It was held that the defendant was not liable for any negligence of the driver, as the driver was not its servant. The court said: "The case is analogous to the hiring of a team with a driver from a liveryman, in which the liveryman remains liable for any injury to third persons due to the negligence of the driver, notwithstanding the fact that the person hiring the team may direct the driver where to go and at what speed. Such a contract does not make the driver the servant of the hirer or render his negligence imputable to the latter."

EFFECT OF MARRIAGE ON EMANCIPATION OF MALE MINOR. — In Austin *v.* Austin, (Mich.) 132 N. W. Rep. 495, which was a divorce action wherein the defendant appealed from an order committing him for contempt for noncompliance with an alimony order, it appeared that both of the parties to the suit were minors, but were above the age of consent at the time of their marriage. The complainant lived with her husband in his father's family, upon the father's farm, until she left him. She filed her bill for a divorce upon the ground of extreme cruelty, and later filed a petition for temporary alimony. An order was made for alimony and expenses, and, defendant having failed to comply with the order, proceedings were instituted to commit him for contempt, resulting in the order appealed from. The defendant resisted the application for temporary alimony and the proceedings to commit him for contempt upon a showing that he had no property of any kind, and that he had never been emancipated, and his father was entitled to and received his wages and services. On these facts the order appealed from was overruled and the defendant discharged. The court said: "We consider this case upon the assumption that the court found the facts to be that the defendant had not been emancipated, unless the marriage of itself effected an emancipation, and that he had no property to enable him to comply with the order. If this were a case of first impression I should agree with the circuit judge that the lawful marriage of minors emancipates both, but I have reluctantly come to the conclusion that such a view is foreclosed by the decision of this court in People *v.* Todd, 61 Mich. 234, 28 N. W. Rep. 79. That opinion can only be sustained upon the ground that marriage alone does not emancipate a male minor."

DISPOSITION OF PROPERTY GIVEN BY WILL TO WIDOW IN LIEU OF DOWER AND RENOUNCED BY HER. — In Dunshee *v.* Dunshee, (Ill.) 96 N. E. Rep. 298, it was held that real property given by will to a widow in lieu of dower and renounced by her passed to the persons named in the will as residuary devisees and not to the heirs at law. The court said: "This court has held in a long line of cases that where the widow renounces the provision made for her by the will of her deceased husband, and elects to take under the law, such renunciation does not have the effect to render any part of the estate of the deceased husband intestate estate. . . . It is said, however, that all the cases on the subject decided by this court are cases in which the property relinquished by the widow was personal property, or an interest in real estate less than a fee; and it is urged that where the property relinquished is, as here, a fee in real estate, the doctrine of the cases heretofore decided by this court upon the subject ought not to apply, as, it is said, at the

common law, which is in force in this State, a lapse or void devise of real estate will go to the heir at law of the testator, notwithstanding the fact that the will contains a residuary clause, because a devise to a particular person or for a specific purpose is recognized as intended to be an exception from the gift to the residuary devisee. . . . Without deciding whether the rule contended for by appellant would apply to a lapsed or void legacy under a residuary clause like the one in the will of Robert Dunshee, we think the rule contended for can have no application to the renunciation by a widow of a provision made for her in the will of her deceased husband, as a devise to a widow is not a lapsed or void legacy after she has relinquished under the will and elected to take under the law."

POWER OF RAILROAD TO LEASE PORTION OF RIGHT OF WAY FOR WAREHOUSE PURPOSES. — In Anderson *v.* Inter-State Mfg. Co., (Ia.) 132 N. W. Rep. 812, it was held that a railroad company although having but an easement in its right of way had power to lease a portion of it to private parties for the erection and maintenance of a warehouse in which to store furnaces manufactured by them, where most of the furnaces so stored were ultimately to be shipped over the lessor's railroad. The question was raised in an action by a person assumed for the purpose of the case to be the owner of the fee in the land, against the lessee of the land, to have the lessee enjoined from maintaining the warehouse. The court in refusing to enjoin such maintenance said: "The concrete question before us then is, whether the use of the building in question for warehouse purposes is under the facts a misuse of the railway company's easement in the land occupied by said building. As we have said, the defendant's manufacturing plant is situated not far from the building in question and near the line of the Chicago, Burlington & Quincy Railway at this point. During the year immediately preceding the trial below the defendant shipped over the Burlington line from this warehouse 750,000 pounds of furnaces, which amounted to over three-fourths of its entire shipments. The location of the warehouse made the loading of this freight easy, and saved the expense of hauling for the purpose of loading. That the railway company might have built and used a warehouse for such purpose on its grounds under its easement cannot be seriously questioned, and, if that be true, we see no reason why the defendant may not legally build and use a warehouse for the same purpose. The principal use to which the building was put was to facilitate shipments over the road owning the easement, and the mere fact that the defendant stored there some furnaces which were shipped over other roads does not, in our judgment, constitute a misuse of the easement. If that were so, then a grain buyer, operating an elevator on the right of way, could not sell a load of grain to a neighboring farmer without forfeiting his right to use his elevator for railway shipping purposes."

COLOR BLINDNESS AS "SICKNESS." — In Kane *v.* Chicago, etc., R. Co., (Neb.) 132 N. W. Rep. 920, it was held that a railway night switchman becoming color blind during his employment was thereby disabled by sickness within the meaning of his employer's contract that it would pay him sick benefits for a limited period while he was disabled by sickness or accidental injury, provided the fact was established by proof of acute or constitutional disease. The court said: "'Sickness' is defined in the Century Dictionary as: '(1) The state of being sick or suffering from disease: a diseased condition of the system; illness; ill health. (2) A disease; a malady; a particular kind of disorder. . . . (4) A disordered, distracted, or enfeebled state of anything.' In the same book we find a definition of color blindness as 'incapacity for perceiving colors, or certain colors.' In commenting upon that condition the author says: 'It is not a mere incapacity for distinguishing colors (for this might be due to want of training), but an absence or great weakness of the sensations upon which the power of distinguishing colors must be founded.' There is no direct evidence concerning the cause of this defect in the plaintiff's vision, and the defendant's counsel argue that the court cannot take judicial notice that color blindness uniformly is caused by sickness, and that, without evidence to explain the cause of the plaintiff's condition, the jury could not lawfully or logically find that cause to have been sickness. Counsel say that this defect may have resulted from the plaintiff's advancing years, and, if so, the defendant is not liable. It does appear, however, that the plaintiff became color blind while in the defendant's employ. There is little, if any, evidence to justify a finding that this color blindness is the result of acute sickness; but could not the jury lawfully have found that it was caused by constitutional disease? The by-laws, as we have seen, recognize constitutional, as well as acute, disease as a satisfactory cause for a disability which will entitle the employee to the benefits of the relief department. We may take judicial notice of the fact that this defect in vision occurs in about five per cent. of all human males in civilized countries, and that it is discovered in every period of life from infancy to advanced senility. The jury knew these facts, and were justified in finding that the plaintiff's optical weakness was inbred, but for some reason did not become evident during his earlier years."

ADMISSIBILITY OF DECLARATION OF EXECUTOR AS EVIDENCE AGAINST LEGATEES AND DEVISEES. — In *In re* Fowler's Will, (N. C.) 72 S. E. Rep. 357, it was held that the declaration of an executor, either before or after the will is probated and he has qualified, that he unduly influenced and compelled the testator to make the will, is not competent as evidence against the legatees and devisees for the purpose of invalidating the will. The court said: "The question in this case, while it is almost of first impression in this State, its novelty is not of that kind which awakens our surprise rather than challenges our most respectful and careful consideration. . . . We are unable to see how the rejected evidence can be competent. There are decisions in other courts which seemingly give some color to the contention of the caveators, but when they are examined and considered with reference to their special facts, if they can be said to conflict with our views, the reasons given in favor of this kind of evidence are more apparent than real. In a certain, and sometimes in a qualified, sense, an executor may be considered as standing in the place of the testator and his creditors, and he may also be said to represent the devisees and legatees in some respects, but for the purpose of destroying or even impairing their interest in the estate the ordinary rule applies that they are not bound by what he says or does. He then occupies a position of antagonism to them, and his declarations should be no more binding upon them than if he had been an entire stranger. . . . The executor, in this case, had no joint interest with the legatees or devisees; his interest consisting solely in his right to manage the estate and to receive the emoluments, that is, the commission arising therefrom. In all other respects his interest was entirely distinct and separate from that of the legatees, and there is therefore no valid reason why he should be permitted to speak for them, or to bind their interests by what he may have declared. It seems that he had influence over the testator — a very potent one — and his declarations, if competent, are sufficient to warrant a finding by the jury of undue influence, as he had the power to subdue the will of the testator to his own; but the vital question is, does the law authorize him to speak for and conclude those who have no joint interest with him? We think not, and the best-considered authorities we believe to be against the competency of such evidence."

LIABILITY OF TELEPHONE COMPANY FOR INJURIES TO SUBSCRIBER DUE TO LIGHTNING STRIKING WIRE. — In Starr *v.* Southern Bell Telephone & Telegraph Co., (N. C.) 72 S. E. Rep. 484, it appeared that the defendant, a telephone company, removed a telephone from the plaintiff's house, but for its own convenience left the wires leading into plaintiff's porch still connected with its general system of wires, and with the loose ends twisted together and hanging down six or eight inches from the plate of the porch. At the same time the defendant removed the lightning arrester, and severed the ground connection of the said wires. There was evidence that the wires left in this condition were dangerous on account of the means thus afforded of their conducting lightning which might strike any part of the defendant's general system of wires in the house, and that the plaintiff was unaware of this danger, but relied upon the defendant to leave the wires in a safe condition. The plaintiff was sitting on his porch under said wires, when a storm accompanied by thunder and lightning came up. The plaintiff arose to go into his house, and, as he stood up, the ends of said wires being about eighteen inches from and to the left of his head, there came a violent clap of thunder, and a ball or bolt of lightning struck him on the left and back of his head, which the plaintiff claimed came from the ends of said wires, rendering him unconscious and seriously injuring him. On these facts the jury found the defendant negligent, and a judgment entered on a verdict for the plaintiff for damages was affirmed. The court said: "The defendant's chief contention is that the court erred in not granting its motion to nonsuit the plaintiff; but we think not. The matter was peculiarly one of fact, and was for the jury to determine. It is true no one saw the discharge of the lightning leap from the wires and strike the plaintiff on the left and back of his head. But the evidence justified the jury in finding such to be the fact. When one fires a pistol at another, no one sees the ball strike the body, but the pointing the pistol within proper distance, its discharge, and the wound are evidence from which the jury can infer the cause of the wound. In dealing with this dangerous agency of electricity, if the defendant left its wires for its own convenience hanging in the plaintiff's porch, it was negligence for which it was liable if the injury of the plaintiff was caused, as the jury finds, by lightning striking on its wires and being discharged against the plaintiff thereby. Especially is this so when the defendant was guilty of the further negligence of taking off the lightning arrester and severing the ground connections."

EFFECT OF DELAY IN EXECUTING ABSOLUTE JUDGMENT OF IMPRISONMENT. — In *Ex p.* Hinson, (N. C.) 72 S. E. Rep. 310, which was a certiorari in lieu of an appeal to review a judgment denying the discharge of the petitioner on habeas corpus, it appeared that at a certain term of the Circuit Court of Wayne county, North Carolina, the petitioner was convicted of retailing spirituous liquors. The entry on the docket was simply: "Judgment of the court that the defendant be imprisoned in the county jail for eight (8) months." The trial judge said to the defendant that if she would leave the county of Wayne and not return she would not be compelled to serve the sentence of imprisonment, and verbally directed the clerk of the court not to issue capias to carry into effect the judgment pronounced until fifteen days after the adjournment of the court. Within that time the petitioner left the county of Wayne, and took up her abode in the adjoining county of Wilson, where she abode until after the expiration of the eight months, when she returned to Wayne. Thereupon she was taken in arrest upon the capias issued by the clerk as directed by the trial judge fifteen days after the adjournment of said court, and was imprisoned in the county jail in execution of the judgment above set out. On these facts the judgment denying the discharge of the petitioner was affirmed. The court said: "The judge might in his discretion have passed judgment to begin at some future time (State *v.* Hamby, 126 N. C. 1066, 35 S. E. Rep. 614), as, for instance, to begin fifteen days after the adjournment of the court. But he did neither of these things. He did less. He rendered an absolute judgment of imprisonment and simply directed the clerk not to issue capias thereon for fifteen days. This was in his discretion. This is sometimes done to give the defendant time to go home and arrange his affairs. In this case the kind-hearted judge, doubtless on account of the sex of the defendant, purposely gave her an opportunity to avoid execution of her sentence. In State *v.* Hatley, 110 N. C. 522, 14 S. E. Rep. 751, the court said that 'such course is not infrequent, and, though dictated by the best intentions to benefit the public, as well as offenders, is not to be commended,' adding that the court had no power to pass a sentence of banishment, and that the judgment of the court could not be fairly so construed, and that if the defendant returned after the time specified, capias should be issued to execute the judgment. The judgment of the court herein is unequivocal. The opportunity which the withholding of the capias afforded the defendant to escape was not a decree of banishment. There was nothing requiring her to leave. If she left, it was of her own free will and accord, and was legally a flight from justice. The defendant cannot plead her own wrong in leaving the jurisdiction of the court by her own voluntary act as a protection against a legal sentence. The distinguished counsel who represented the defendant attempted to distinguish this case from State *v.* Hatley, *supra,* on the ground that in this case the defendant remained in the adjoining county for the full eight months of the sentence. There is no statute of limitations in such case. The position of counsel could be sustained only on the ground that eight months sojourn in another county is the equivalent of eight months imprisonment in the county jail of Wayne. His loyalty to his home is like that of 'the Argive, who, in dying, remembers sweet Argos.' His position, if submitted as a proposition of fact to a Wayne county jury, might possibly not be altogether hopeless, but we cannot sustain it as a proposition of law."

New Books.

THE LAW OF THE EMPLOYMENT OF LABOR.

By Lindley D. Clark, LL.M. Pp. xiii+373. The Macmillan Company, New York, 1911. $1.60.

Mr. Clark has given us an excellent little treatise on the law of the employment of labor based on the holdings of the courts in the various cases wherein questions pertaining to labor have arisen. He discusses such questions as the contract of employment, wages, hours of labor, regulation of the physical conditions of employment, employment of women and children, restrictions of employees, liability of employers for injuries to employees, workmen's compensation laws, negligence of employees, trade and labor associations and labor disputes. His consideration of the labor decisions, while inadequate for lawyers, would seem to be admirably suited to the needs of the layman desirous of becoming acquainted with a body of law of peculiar interest and great consequence to people generally.

BANK DEPOSITS.

By John Edson Brady of the New York bar. Pp. vii+319. Banking Law Journal Co., New York, 1911.

The volume at hand concerns itself with three kinds of bank deposits, namely, trust, alternate, and joint. It is divided into two parts and two appendices. The two parts, one of which relates to trust deposits and the other to joint and alternate

deposits, contain a narrative treatment of the rules deduced from the authorities on the subject, which are cited in the footnotes. This treatment is brief and occupies but a small portion of the volume, the bulk of it being given up to Appendix A, which contains a detailed consideration of the authorities, most of which are already cited and relied on in the narrative treatment of the subject. The authorities are here arranged under State catchlines, and an attempt is made to give the facts of each case and the holding of the court. Appendix B, which follows, sets out in full the statutes of the various States on the subject. The defect in the book is that there is needless duplication of matter in places. Apart from this, the work seems to have merits, and the full treatment of the cases in Appendix A should be particularly helpful.

News of the Profession.

THE LEGAL AID SOCIETIES of the United States held their first convention in Pittsburg, Pa., on November 10.

THE NEW YORK STATE BAR ASSOCIATION will hold its next annual meeting in New York city on January 19 and 20, 1912.

APPOINTMENT OF INDIANA JUDGE. — John W. Spencer of Evansville, Ind., has been appointed judge of the Indiana Circuit Court, succeeding the late Judge A. C. De Bruler.

THE NEBRASKA STATE BAR ASSOCIATION met in annual session at Lincoln, Neb., on December 28 and 29. Further particulars of the meeting will be given in the next issue of LAW NOTES.

NEW JERSEY JUDGE RESIGNS. — Judge Thomas A. Davis, senior judge of the Court of Common Pleas of Essex county, N. J., resigned from the bench on December 9.

THE SOUTH CAROLINA BAR ASSOCIATION will hold its annual meeting at Columbia, S. C., on January 18 and 19, 1912. Alton B. Parker of New York will deliver the annual address.

CONFERENCE OF JUVENILE COURT JUDGES. — The third annual conference of the Middle West States' Juvenile Court Judges and Officers was held in Huntington, W. Va., on November 14, 15, and 16.

THE OKLAHOMA STATE BAR ASSOCIATION held its annual meeting in Oklahoma City, Okla., on December 21 and 22. The proceedings will be reported in detail in the February number of LAW NOTES.

COLORADO JUDGE APPOINTED. — Governor Shafroth of Colorado has appointed James H. Teller of Denver to fill the vacancy on the District Court bench caused by the death of Judge Carlton M. Bliss.

NEW APPELLATE TERM OF NEW YORK SUPREME COURT. — A new appellate branch of the New York Supreme Court, to be known as the Appellate Term in the Second Judicial Department, will sit in 1912 to hear appeals from judgments and orders of the Municipal Court in the Second Judicial District. The first session will be held on the first Monday of March.

APPOINTMENT OF WASHINGTON ATTORNEY. — The state department has announced the appointment of Arthur Thompson, a well-known attorney of Washington, D. C., to be a member of the Nicaraguan Mixed Claims Commission. He succeeds Thomas Moffatt, who was appointed consul to Singapore and transferred from Managua.

CONFERENCE OF AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY. — The third annual conference of the Wisconsin branch of the American Institute of Criminal Law and Criminology was held on December 1 at Milwaukee, Wis. Circuit Judge A. H. Reid of Wausau presided. President Stephen S. Gregory of the American Bar Association delivered an address on "Insanity as a Defense and Some Cases." Other addresses were by Judge Franz C. Eschweiler, Col. Nathan B. MacChesney, and Judge August C. Backus.

TABLET TO JOHN MARSHALL. — A bronze tablet in memory of John Marshall, first chief justice of the Supreme Court of the United States, was unveiled in the United States Circuit Court of Appeals at Philadelphia on November 25. The tablet was erected by the Pennsylvania Bar Association. Six portraits of former associate justices of the Supreme Court and of three judges of the United States Court at Philadelphia were unveiled at the same time. Justice Lurton of the Supreme Court of the United States presided at the ceremony and unveiled the Marshall tablet. Judge George Gray accepted the tablet and portraits. Nearly 1,000 members of the bench and bar attended the ceremonies.

NOTED MEMBER OF NEW BRUNSWICK BAR DEAD. — W. Albert Mott, K. C., one of the most brilliant members of the New Brunswick bar, died at St. John, N. B., on December 1. He went to St. John several months ago from his home in Campbellton for treatment. He was in the legislature for several years, and in 1908 was a candidate in Restigouche for the Commons in the Conservative cause, but was defeated.

MASSACHUSETTS JUDICIAL APPOINTMENTS. — Governor Foss of Massachusetts has added the following to his long list of judicial appointments: Otis J. Carleton, of Haverhill, junior associate justice of the central district court of northern Essex; Thomas P. Riley, of Malden, associate justice of the Malden district court; Arthur M. Alger, of Taunton, judge of probate and insolvency for Bristol county; Michael J. Creed, of South Boston, assistant judge of Boston Municipal Court; William F. Merritt, of Dorchester, special justice of the Dorchester court.

RHODE ISLAND STATE BAR ASSOCIATION. — The annual meeting of the Rhode Island State Bar Association was held at Providence, R. I., on December 4. The programme included address by Prof. George Grafton Wilson, formerly of Brown University and now professor of international law at Harvard, on "A Law for the Nations," and by William Dudley Foulke of Indiana, a former member of the United States Civil Service Commission, on "A Court for the Nations." The association presented to the State a portrait of the late Chief Justice Pardon E. Tillinghast. The election of officers for the new year resulted as follows: President, Albert A. Baker; first vice-president, Cyrus M. Van Slyck; second vice-president, William P. Sheffield, Jr.; secretary, Howard B. Gorham; treasurer, James A. Pirce; executive committee, Dexter B. Potter, William A. Morgan, Amasa M. Eaton, Charles C. Mumford, and Chester W. Barrows.

HARLAN MEMORIAL SERVICES. — The bench and bar of the Sixth Judicial Circuit, comprising the States of Ohio, Kentucky, Tennessee, and Michigan, held memorial services for the late Justice John M. Harlan in Cincinnati, Ohio, on November 18. Several hundred judges and lawyers were present from the four States. Judge John W. Warrington presided, and with him on the bench were Judges Knappen and Denison of Michigan, Judge Cochran of Kentucky, Judge McCall of Tennessee, Judge Sater of Columbus, Judge Sanford of Tennessee, and Judge Howard Hollister of Ohio. The official memorial was presented by Hon. A. P. Humphreys, of Louisville Ky., chairman of the committee, and addresses were made by presiding Judge Warrington; Hon. Edward Colston, of Cincinnati; Hon. W. L. Granbery, of Nashville, Tenn.; Hon. Otto Kirchner, of Detroit, Mich., and Hon. T. Z. Morrow, of Somerset, Ky. Judge Morrow was a schoolmate of Justice Harlan at Center College, Ky., and his lifelong friend.

CALIFORNIA STATE BAR ASSOCIATION. — The second annual meeting of the California State Bar Association was held in Sacramento, Cal., on November 13, 14, and 15. The president's address was delivered by Lynn Helm of Los Angeles, his subject being "A Progressive Judiciary." Hon. Peter W. Meldrim of Savannah, Ga., gave the annual address on "What Have You to Defend?" Governor Johnson spoke on "Recent Legislation in California," and Justice A. G. Burnett of the Appellate Court read a paper on the "Relation of Bench and Bar to Each Other." An address on "Our Democracy in Its Relation to Law and Its Administration" was delivered by A. M. Haines of San Diego. The following officers were elected: President, C. E. McLaughlin, of Sacramento; vice-presidents, W. H. Donahue, First District; Alfred Haynes, Second District; J. J. Wells, Third District; secretary, T. W. Roberts; treasurer, H. C. Wyckoff; executive committee, Judge Lohmeyer, A. F. Jones, Judge C. H. Lindley, Judge K. K. Law, and Karl Allen. Fresno was chosen as the meeting place of the 1912 convention.

DEATH OF WILLIAM HEPBURN RUSSELL. — William Hepburn Russell, senior member of the law firm of Russell, Collins & Myers, of New York city, died at his home in that city on November 21. Mr. Russell was born at Hannibal, Mo., on May 17, 1857. He was educated at the public schools and took a course at a commercial college. He worked as reporter and editor on the *Courier, Clipper-Herald,* and *Journal* of Hannibal and studied law meanwhile. He was admitted to the bar in 1882, became city attorney of Hannibal the same year and served until 1884, when he moved to Indianapolis. He became general counsel for the Louisville, New Albany and Chicago Railroad. In 1887 he moved to Chattanooga and lived there until 1895, when he took up his abode in New York city. In 1892 he was a Democratic Presidential elector. Mr. Russell was the president and principal owner of the Boston National League baseball club. He was a coreceiver of the Mutual Reserve Life Insurance Company. With William Beverley Winslow he was the author of Russell and Winslow's Syllabus Digest of United States Supreme Court Reports.

THE OREGON STATE BAR ASSOCIATION held its annual meeting at Portland, Ore., on November 21 and 22. W. T. Slater, of Salem, delivered the president's address. Other speakers and their subjects were as follows: "What Changes Should Be Made in Our Judicial System?" by Will R. King, ex-justice of the State Supreme Court; "Workmen's Compensation," by Harold Preston, of Seattle; "The Next Great Reform Relating to Reforms in Pleading and Practice," by Judge C. H. Carey, of Portland; "Duties of the Lawyers of the Present Day," by United States District Attorney John McCourt. The following were elected officers for the ensuing year: President, Martin L. Pipes of Portland; vice-presidents, Clarence Reames of Jacksonville, J. W. Hamilton of Roseburg, Charles L. McNary of Salem, J. B. Cleland of Portland, F. J. Taylor of Astoria, C. W. Phelps of Heppner, E. N. Hartwick of Hood River, L. A. Johnson of Baker, W. H. Brooke of Ontario, Colon R. Eberhard of La Grande, D. R. Parker of Fossil, Henry L. Benson of Klamath Falls; secretary, W. L. Brewster; treasurer, C. J. Schnabel; executive committee, C. J. Schnabel, J. E. Hedges, Oscar Hayter, A. J. Perby, and Will R. King.

DEAN OF CATHOLIC UNIVERSITY LAW SCHOOL DEAD. — Prof. William Callyhan Robinson, dean of the Catholic University Law School of Washington, D. C., died at his home in that city on November 6. Professor Robinson was born in Norwich, Conn., July 26, 1834, and received his early education in the private schools there and at Wesleyan Academy. He was graduated from Dartmouth College in 1854, with the degree of A. B. He received the degree of doctor of law from Dartmouth in 1879, and his master of arts degree from Yale in 1881. For eleven years after he graduated from Dartmouth, Prof. Robinson practiced law in New Haven, at the same time lecturing in the university. He was judge of the city court of New Haven from 1869 to 1871, afterward being appointed judge of the Court of Common Pleas of Connecticut. He served in this capacity until he went to Washington. Prof. Robinson was lecturer on law in Yale University from 1869 to 1872, and a professor of common law there from 1872 to 1896. At the commencement exercises in June, 1909, at which President Taft was present, a tablet was unveiled in his honor. As an author of legal works Prof. Robinson attained much prominence. His "Elementary Law" is considered a standard book to-day, and is used in all the law schools of the country, having been sanctioned by the Association of American Law Schools and Universities. Other celebrated works of his are: "Notes of Elementary Law," "Life of Ebenezer Beriah Kelly," "Clavis Rerum," "Law of Patents," in three volumes; "Forensic Oratory," and "Elements of American Jurisprudence." From 1867 to 1910 he was a contributor to leading legal periodicals, and in 1903 was editor of the *Mirror of Justice.* He wrote many legal essays and was considered an authority in patent law, sending one of his pupils to revise the patent laws of Japan, for which he was signally honored by the Mikado.

CHANGES UNDER NEW FEDERAL JUDICIARY CODE. — In compliance with the new judiciary code enacted by the last Congress, seventy-seven United States Circuit Courts pass out of existence Jan. 1, 1912. The Circuit Courts since their creation in 1891 have been deemed expensive and superfluous, and their abolishment is one of the many reforms of the new code. The twenty-nine Circuit Court judges who have transacted business at 276 places in the United States will not lose their posts, as they will continue to sit on the United States Circuit Court of Appeals, and assist in the District Court where the dockets are crowded. All the clerkships of the Circuit Courts will be abolished. At the same time, however, restrictions will be placed upon the amount that a district clerk may draw as salary. Hereafter it will be impossible for a clerk to receive more than $3,500 per year. After January 1 the Chief Justice of the United States will receive $15,000 per year and the associate judges $14,500 each. Under the new code, jurors for federal courts will receive their summons by registered mail instead of by personal visits by deputy United States marshals, and the government will have six peremptory challenges in selecting federal court juries instead of three, as in the past. Still another reform will come in the shape of a prohibition against members of Congress practicing before the United States Court of Claims at Washington, D. C.

SIR GEORGE HENRY LEWIS DEAD. — Sir George Henry Lewis, senior member of the firm of Lewis & Lewis, solicitors, died in London on Dec. 7. Sir George Henry Lewis for the last fifty years was one of the best criminal lawyers in England, and was believed to know the secrets of every family in the British peerage and a great many others who were outside of that famous record. He was a regular first-nighter at the London theatres, and no play was considered to have been regularly produced before the public unless Sir George was in the front or second row of the stalls. The firm of Lewis & Lewis, of which he was the senior member, was well known in the legal profession for its famous cases, and among those handled by them were the Tranby Croft baccarat scandal, in which the late King Edward, as Prince of Wales, figured, and the Colin Campbell divorce suit. During his long career Sir George rendered useful services to the royal family, and for this he was knighted in 1893 by Queen Victoria and received a baronetcy from King Edward in 1902. Sir George Lewis never was known to divulge

any of the secrets that were intrusted to him by any of his distinguished clients, and this qualification made them feel safe in seeking his advice. He was born in 1833, the son of Jewish parents, and went to school at Edmonton, where he became equally well known for getting into scrapes and for his facility in getting out of them. His first big case, after being admitted as a solicitor to practice law in 1856, was the prosecution of the directors of Overend & Gurney's Bank, which went to smash, and the manner in which he handled the case brought him a lot of mercantile business. Another case at that time was a fraud on Lloyds' Salvage Association, in which a ship with a cargo of salt valued at $15 had been scuttled to secure an insurance of $150,000. All those concerned in the business were sentenced to penal servitude for a long term. Sir George Lewis was a solicitor, and not a barrister, whose duty is to plead in court on the briefs that have been prepared for him by the solicitor. He prepared the papers in the Parnell case for the defense, and prosecuted the notorious Mme. Rachel and the spiritualistic medium Slade. The offices of Lewis & Lewis were in a house in Ely Place, a quaint, old-fashioned byway off Holborn Hill, with carved black oak staircase and ceilings, and furniture to correspond. Sir George occupied a large room luxuriously furnished with Turkey pile carpet and rich tapestries, which were in direct contrast with the quiet tone of the clerks' office outsde. He always sat in front of a finely carved Sheraton desk, with his hands pressed closely together, and had the habit of driving his clients to despair by his gloomy view of their side of the case until he started to describe what slim chances the other side had of winning. Sir George was a slender-built man about the average height, with wavy gray hair and short-cropped sidewhiskers, shrewd-looking gray eyes, and rather comely features. He retired from active interest in his profession in 1910.

DEATHS. — In addition to those mentioned above, the following deaths in the profession have occurred since our last issue: Richard Henry Alvey, Jr., Hagerstown, Md.; Judge David D. Anderson, Knoxville, Tenn.; A. D. Austin, Everett, Wash.; C. B. Bacheller, Emporia, Kan.; Capt. John S. Barnes, New York city; Judge Carlton M. Bliss, Denver, Colo.; Cormac F. Bohan, Pittston, Pa.; Judge John B. Bottineau, Washington, D. C.; Peter Boyd, Philadelhia, Pa.; James Rawlings Brewer, Baltimore, Md.; Albert W. Brown, Boston, Mass.; Judge William W. Brown, Lewisburg, Pa.; ex-Justice Edward Browne, New York city; McGeorge Bundy, Grand Rapids, Mich.; Jere T. Burke, San Francisco, Cal.; Herman S. Butler, Westerleigh, N. Y.; Patrick Campbell, Wilkesbarre, Pa.; T. Bun Carson, Ripley, Tenn.; ex-Judge O. P. Chamberlain, Flemington, N. J.; Francis J. Clark, Ashland, Pa.; Major M. H. Clift, Chattanooga, Tenn.; John F. Cox, Homestead, Pa.; Horace S. Cummings, Washington, D. C.; Leon P. Cunningham, Joplin Mo.; Judge Curran A. Debruler, Evansville, Ind.; Charles Lincoln Dickerson, Denver, Colo.; Judge J. B. Driggs, Bridgeport, Ohio; ex-Judge Branch R. Epes, Petersburg, Va.; William L. Eyerly, Bloomsburg, Pa.; Milton A. Fowler, Poughkeepsie, N. Y.; L. O. Fraim, Caldwell, Texas; Judge William Eddy Fuller, Taunton, Mass.; John Lentz Garrett, Chester, Pa.; Judge B. J. Gayle, Selma, Ala.; Judge W. P. Gibson, Kingsville, Mo.; Frank Kingsley Grant, Schoharie, N. Y.; William T. Green, Milwaukee, Wis.; John M. Harrison, Findley, Ohio; Horace Hawes, Fresno, Cal.; ex-Judge James Hendrie, Long Beach, Cal.; Richard H. Hepburn, Milford, Conn.; Daniel Boone Holmes, Kansas City, Mo.; Guy M. Hornor, New Orleans, La.; Judge John Henry Ingram, Richmond, Va.; Judge John David Jones, Columbus, Ohio; John Harrison Kemble, Roselle, N. Y.; Judge John M. King, Knoxville, Tenn.; John Kuhbach, Honesdale, Pa.; Saul R. Lavine, Syracuse, N. Y.; Philip Lindsley, Dallas, Texas; William H. Love, Buffalo, N. Y.; Benjamin A. Mason, Brooklyn, N. Y.; Col. William P. Maulsby, Frederick City, Md.; Judge H. A. McFarland, Wales, Mass.; George H. McKinley, Rock Island, Ill.; William Mintzer, San Francisco, Cal.; Edward Moran, Brooklyn, N. Y.; Judge P. B. Muir, Pewee Valley, Ky.; William T. Muir, Portland, Ore.; Robert E. Nason, Boston, Mass.; Charles E. Naylor, San Francisco, Cal.; Harry E. Northrup, Portland, Ore.; Judge Joseph E. Ong, Grand Junction, Colo.; Judge Richard B. Owen, Mobile, Ala.; Judge A. B. Patton, Ogden City, Utah; Robert B. Petty, Sr., Pittsburg, Pa.; Amos H. Pierson, Chicago, Ill.; James L. Powers, Malden, Mass.; James A. D. Richards, Canal Dover, Ohio; Samuel Riker, New York city; Reuben E. Robie, Bath, N. Y.; Judge Louis C. Schwerdtfeger, Lincoln, Ill.; Levi M. Scott, Greensboro, N. C.; William M. Shoemaker, Wilkesbarre, Pa.; Judge R. M. Skinner, Princeton, Ill.; Henry C. Smith, Adrian, Mich.; Judge N. E. Smith, Ridgeway, Va.; William Walter Southworth, Brooklyn, N. Y.; Charles W. Steele, Beatrice, Neb.; Charles W. Stevens, Hornell, N. Y.; Col. Charles Crook Suydam, Elizabeth, N. J.; James F. Sweeney, Boston, Mass.; Samuel L. Wallace, Lincoln, Ill.; William M. Warnock, Edwardsville, Ill.; Sol. White, Cobalt, Can.; Frederic Cope Whitehouse, New York city; Judge M. H. Wilkinson, Gloster, Miss.; Edward M. Wright, Kansas City, Mo.

English Notes.

PUBLICATION OF DIVORCE PROCEEDINGS. — A committee has been formed in Dublin, called the Dublin Vigilance Committee, for the purpose of discountenancing the publication in the press of divorce proceedings and other news of a similar scandalous character. This result is to be effected by an attempt to exercise influence on the managers and editors of Dublin newspapers, the wholesale and retail vendors of newspapers, and the newsboys.

THE KING EDWARD SCHOLARSHIP. — The King Edward VII. Scholarship for Legal Study and Research, of the annual value of one hundred guineas, established as a memorial of his late Majesty, and open to all barristers of the Middle Temple, has been awarded as from November 9 (being the anniversary of King Edward's birth) to Mr. J. E. G. de Montmorency, M. A., LL. B., of St. Peter's College, Cambridge, barrister at law, of the Middle Temple, and assistant secretary to the Royal Commission on Divorce. The subject for research in the present year is "The Principles for an International Code of Marriage Law."

PLUCKING OF LIVE GEESE AS CRUELTY TO ANIMALS. — Is the plucking of live geese, for the purpose of the sale of their feathers, cruelty to the birds within the meaning of section 2 of 12 & 13 Vict., c. 92? That was the question that was discussed in the King's Bench Division on November 17 in the case of Lennane *v.* Leachy. The case came before the court on a case stated by the Limerick justices, who had come to the conclusion of fact that such plucking was not cruelty, and that, on the contrary, it was necessary to prevent vermin, and that it improved the condition of the birds. A photograph of geese after being plucked was produced "showing that there was nothing so done indicating cruelty." In view of these courageous findings of fact of the magistrates it was difficult for the Divisional Court to interfere. Ultimately, after a lengthened argument, the court made no rule on the case before it, but it was suggested that, as there was an important principle involved, the matter should be brought before the court by

another case stated, embodying a shorthand note of the whole of the evidence.

CAPITAL PUNISHMENT AS DETERRENT TO CRIME. — The best method of dealing with criminals convicted of murder was discussed at a recent conference held under the auspices of the Society for the Abolition of Capital Punishment. Letters were read from Mr. Justice Grantham and Mr. Justice Channell, each maintaining that capital punishment was a great deterrent to criminals. Mr. Justice Grantham wrote that he was convinced that if capital punishment were abolished in the country life would be less secure than it was now. Fear of it prevented a great number of bad criminals from committing murder to avoid detection, and he thought it the duty of society to protect the lives of innocent people rather than save the lives of murderers. Mr. Justice Channell expressed the opinion that the criminal classes in England had a great horror of death at the hands of justice, and that the fear of it was a very great deterrent. Some criminals, he added, were not generally capable of being influenced by any consideration of the consequences of their crime, and in such cases capital punishment was ineffectual as a deterrent, and might, therefore, be somewhat difficult to justify.

INFANT CRIMINALS. — Part 2 (General Report and Appendices) of the fifty-fourth report, for the year 1910, of the inspector appointed to visit the certified reformatory and industrial schools of Great Britain has been issued as a Blue Book [Cd. 5949]. The inspector, Mr. T. D. Robertson, says that the number actually in reformatories at the end of 1910 was 4,759 (4,163 boys and 596 girls). The number in industrial schools was 16,356 (12,261 boys and 4,095 girls), and in special schools 104 (76 boys and 28 girls). The admissions to the schools generally continue to be rather fewer than before the passing of the Children Act, and the number of children and young persons under detention at the end of the year was 225 less than at the end of 1909. The reformatories, again, show an improvement in results, the percentage in regular employment being 82 in the case of boys and 81 in the case of girls; while the proportion of relapses is 11 per cent. of boys (against 12 in the previous year) and 4 per cent. of girls (against 45). Of 11,545 ex-inmates of schools 1,787 are in the army and 1,619 in farm service. During the year 194 children and young persons emigrated, generally to Canada.

WHAT IS A PRIZE FIGHT? — The question of the legality of boxing contests has again been raised by the decision of the stipendiary magistrate at Birmingham to bind Moran and Driscoll over to keep the peace. The test generally applied, in order to ascertain whether a proposed boxing contest can legally be held, is whether the proposed contest is to be a mere exhibition of skill, in which case it would not be illegal, or a contest in which the parties intend to fight in such a manner that actual bodily harm to one or both of them may result. Reg. *v.* Orton, 39 L. T. Rep. 293, 14 Cox C. C. 226, and Reg. *v.* Coney, 46 L. T. Rep. 307, 8 Q. B. Div. 434. If the proposed contest comes within the latter category, it is the duty of the magistrate to bind the combatants over to keep the peace. Reg. *v.* Billingham, 2 C. & P. 234. In the case of Moran and Driscoll, the learned stipendiary appears to have found on the facts that the proposed contest would amount in law to a prize fight. He consented to state a case for the opinion of the high court if, on consideration, he found he could do so. The decision of the high court will be awaited with considerable interest in view of its probably far-reaching effect.

JOURNALISM AND COPYRIGHT. — A very interesting and practical debate in the Lords during the committee stage of the Copyright Bill has shown that in the interests of journalists some reconsideration of the bill might well be given by its backers. The material clause certainly sweeps away some vagueness in the existing law, and it is provided that, in the absence of some contract to the contrary, a journalist is the owner of the copyright, but there is an exception where there is a contract of service. The Institute of Journalists has expressed some dissatisfaction with the new proposals, and would support some amendment limiting republication of contributions in book or other permanent shape. No doubt some difficult cases arise out of such matter as war news, where a correspondent has been paid large sums by a paper for exclusive contributions, and he might somewhat injuriously affect the value of his letters by republishing them very shortly after their appearance in the paper. The question of contracts of service is in itself difficult. The general effect of the clause has been summarized in the House of Lords as bringing it about that a writer might be made to accept for £300 a contract of service for articles which a newspaper could reproduce at a profit of some thousands. There are admittedly difficulties to be met alike by the journalist and the newspaper owner, and it is understood that some further notice is to be taken of these at a later stage.

IMPULSIVE INSANITY AS DEFENSE IN CRIMINAL CASES. — In a case recently before the Court of Criminal Appeal, Mr. Justice Darling, in delivering the judgment of the court dismissing an appeal from a conviction for murder, on the ground that the prisoner acted under an irresistible impulse and was therefore insane at the time when he committed the crime, made some observations on the frequency of crimes of violence committed through motives of jealousy. The learned judge pointed out that cases of impulsive mania leading to homicide were usually cases in which no motive for the crime could be found. The absence of motive is not, of course, of itself a ground for inferring an irresistible and insane impulse (Reg. *v.* Haynes, 1 F. & F. 666), but it is, as a rule, urged as evidence of insanity, where that defense is set up. Much must depend upon the circumstances of each particular case, but the test laid down in M'Naghten's Case still remains the leading principle upon which the question of insanity must be decided — namely, "whether the accused was laboring under such a defect of rea-

son, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." The courts have held that it is no defense for the accused person to prove that he acted under an irresistible impulse, if it is shown that he was in full possession of his reasoning powers. Reg. *v.* Francis, 4 Cox 57. It is quite clear that murder and crimes of violence committed from motives of jealousy do not come within these decisions. In the case before the Court of Criminal Appeal referred to above, jealousy was put forward as the motive for the crime, and for the defense it was suggested that the case was one of impulsive insanity caused through jealousy. The court dismissed the application, holding that under the circumstances there was no evidence of insanity to go to the jury.

Obiter Dicta.

A CONSTRUCTION CASE. — Crane *v.* Derrick, 157 Cal. 667.

SPLITTING THE WOODPILE. — Pyle *v.* Woods, 18 Idaho 674.

SUBSTANCE AND SHADOW. — Dollar *v.* Wind, 135 Ga. 760.

TWO KINDS OF NUTS. — Nutt *v.* Knut, 200 U. S. 13.

NON CONSTAT. — In State *v.* Winner, 153 N. Car. 602, the defendant came out a loser.

CHEESE WRONG. — In U. S. *v.* Baumert, 179 Fed. Rep. 735, the defendant was charged with misbranding cheese. One of the informing witnesses was James W. Chesewright.

THE ADULT CODE GETS IT TOO. — "The cold, not to say inhuman, treatment which the infant code received from the New York judges is matter of history." See McArthur *v.* Moffett, 143 Wis. 564.

LOST! A COURT'S OPINION. — "The opinion of the court was delivered by Ogden, J., affirming the decree of the chancellor. The reporter regrets that, after diligent search and inquiry, he has been unable to find it." See Hunterdon County Bank *v.* Nassau Bank, 17 N. J. Eq. 496.

WANTED TO SEE IT. — "W. B." says that in a case tried before a magistrate in his town the defending agent made reference to a verbal agreement between the parties. "Let's see yer verbal agreement," the magistrate said. "Hand it up here." — *Glasgow Herald.*

ONLY SMALL PLACES NEED APPLY. — The Federal Act of June 30, 1906 (c. 3442, 34 St. L. 313, Fed. St. Ann. 1909 Supp. 628), contains the following proviso: "And provided further, That no sponges taken from said waters shall be landed, delivered, cured, or offered for sale at any port or place in the United States of a smaller size than four inches in diameter."

SPEAKING FROM EXPERIENCE? — "There is a resort in that great city known as the 'Golden Lion.' It seems beer is sold there. Houtz, the plaintiff, serves at the 'Golden Lion,' presumably assembling such proportion of beer and foam in each customer's glass as leaves the 'Golden Lion' an increment of profit on the sale." *Per* Lamm, J., in Houtz *v.* Hellman, 228 Mo. 655.

DAMNUM ABSQUE INJURIA. — The fourth paragraph of the syllabus to Hargrave *v.* Shaw Land Co., 111 Va. 84, begins as follows: "An invitee on a railroad track who is run over by a locomotive and killed at night cannot recover of the company," etc. No reason being assigned for this denial of any legal remedy, we are compelled to infer that the plaintiff cannot recover because he has removed from the jurisdiction.

GOOD ADVICE FOR LAWYER OR LAYMAN. — To a counsel arguing before him at Clerkenwell County Court, Judge Edge remarked: "Let me tell you a story of a case in which as counsel I appeared before Mr. Justice Mellor. I had used my strongest arguments, and thinking I was not convincing him I used some weak arguments afterward. Mr. Justice Mellor said to me: 'Now, Mr. Edge, don't put too much water in your brandy.'" — *London Evening Standard.*

MUST HAVE BEEN THINKING OF ANTI-TRUST LITIGATION. — At an examination recently conducted in a certain law school in St. Louis, Mo., the following question was asked the class taking a course in pleading: "State when pleadings conclude to the country, and when with a verification." One of the students answered as follow: "Pleadings conclude to the country when there are great moral issues at hand where justice is not positive or likely in the regular course of the law."

HE FLED! — In St. Louis, etc., R. Co. *v.* Woodruff, 89 Ark. 9, it appears that the plaintiff Woodruff was ejected from one of the defendant's trains because she was insane, and that she was intrusted to the care of the defendant's telegraph operator who was at the time in charge of the station. How well the operator discharged his trust may be learned from the following terse statement by the court: "The evidence discloses that this operator went out at the window when appellee went into the waiting room."

POSSESSION AS EVIDENCE OF OWNERSHIP. — If the contention of the appellant in E. E. Forbes Piano Co. *v.* Reynolds, 56 So. Rep. 270, should be generally accepted as correct, the possession of a piano by a poor man not only would be no evidence of its ownership by him but would in fact be *prima facie* evidence to the contrary. But the court disposes of the contention in the case at bar in the following interesting manner:

"The appellant contends that, as the evidence without conflict shows that Selman was poor and unable to own a piano, the purchase by him of such an instrument was alone sufficient to have given notice of the existence of appellant's claim. The

argument is that when a man in Selman's condition in life buys a piano the community knows that he has not the money with which to pay for it, and that therefore the community, and each member of it, knows that the vendor, under such circumstances, has protected himself by the reservation of title to the instrument until paid for. We are inclined to think that in each rural community there are to be found certain well-inclined individuals who keep the entire community reasonably well informed as to the mode of life and the articles of personal and household adornment of each of their neighbors; and we are not inclined to lend an unwilling ear to the proposition that when Selman brought the new piano home with him and installed it in his house, and upon its responsive keys translated into music his conception of the Dead March in Saul, or Nevin's Canzone Amoroso, the neighbors, or at least some of them, sat up and talked and wondered where and how he got it. But after Selman had remained in possession of the instrument for eighteen months, and during that period had thus, in melodious tones, without molestation, advertised his ownership of it, we are inclined to believe that curiosity had been rightfully lulled into repose, and that when appellees took their mortgage in August, 1905, there was, under the evidence as it appears in the record, no fact, conceding the want of actual knowledge, tending to put them on inquiry as to the existence of appellant's claim."

GETTING BACK AT THE BAR. — At a meeting of the Bar Association of a certain county in New York State not long since resolutions were adopted favoring the amendment, as far as that particular county was concerned, of the statutes relating to the publication of legal notices, the resolutions reciting that the charges of the newspapers in that respect were grossly excessive. Shortly thereafter the Press Association of the county held a meeting and the following burlesque resolutions were read for the enjoyment of the members present:

"Resolved, That the charges made by lawyers of the —— County Bar Association are excessive, unjust, and without defense, and that laws should be passed to make them conform to the value of the services actually rendered. Inasmuch as the laws of the State create lawyers and regulate and govern their admission to the bar, we believe it to be a proper function of the legislature to regulate their charges, and a few recommendations are hereby made as follows:

"For drawing a will where the cost of the printed form is five cents, the charge for the lawyer's services to be not to exceed thirty-five cents.

"For appearance in court the charge to be twenty-five cents for each hour of time actually employed in trial of case. (No time to be allowed for travel to and from court, nor for time spent in waiting for beginning of action.)

"For preparing brief or other papers other than stated forms, charge to be nine cents for the first folio and two and one-half cents per subsequent folio, said charges to apply only to such words as an ordinary person would use to make his point clear.

"For actions brought for a client which are lost no charge shall be made, since the client cannot in reason be penalized for the incompetency of his lawyers.

"For causes discontinued by client at any time before or after judgment is given no charge is to be made, as it is palpable that lawyers are not competent to execute valid contracts binding upon clients."

Law Notes

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CONTENTS

The Recall of Decisions.

COL. ROOSEVELT, as all the world now knows, favors the right of repeal by popular vote of decisions which declare desirable laws unconstitutional. The recall of decisions, as the plan has been named, is, at least, not open to the objection advanced against the recall of judges, that fair and competent members of the bench are thereby subjected to the risk of public disgrace for conscientiously declaring the law as they find it. In respect to acts which are held to be in conflict with the fundamental law of a State the Colonel's object can, of course, be achieved by the time-honored process of constitutional amendment. He has, however, in mind those cases in which a State statute is declared by a State court to be contrary to the Federal Constitution. But would not a section in a State constitution providing for the repeal of such a decision be itself in conflict with the Federal Constitution? The Colonel probably realizes the difficulties that confront him. If we are not mistaken he, in the bottom of his heart, very much envies Lloyd George, the British Chancellor of the Exchequer, who is entirely unhampered by the courts in carrying out his projects to better social conditions.

Lawyers as Public Officers.

SOME time ago we thought of throwing out the prediction that the lawyer of the future might be possibly a public officer paid, as are our judges and health officers, from the State or municipal treasury. A friend was of the opinion that such an idea is too fanciful to be seriously entertained. Within the past month, however, the plan has been actually advocated in the retiring address of President Doerfler of the Milwaukee Bar Association. Mr. Doefler hit upon the most important objection to the present status of the lawyer when he said: "The profession is too closely identified with success or failure of litigation. The object of the attorney is to obtain success, and this is often accomplished at the sacrifice of the highest purpose for which the profession exists, the aiding in the administration of justice. Justice does not necessarily mean that the lawyer should succeed in winning a lawsuit. So long as private individuals are allowed to use an officer who is a *quasi*-public officer as their representative, and pay him from their private means, so long will the ends of justice, to a great extent, be diverted from that source. An attorney is a *quasi*-public officer. His duty, so far as the public is concerned, and as an officer of the court, is to aid and assist in the administration of justice. I would suggest that the duty owed to the client be decreased proportionately, so that private interest shall have no power to trespass upon the rights of the public." Mr. Doerfler's plan is to require the client engaging the services of an attorney to pay into the public treasury a certain sum for the services of the counsel. Many successful members of the profession would undoubtedly look upon their status under such a plan as infinitely preferable to their present position.

Our Friend the Inventor.

AS long as the ingenious brain of the inventor continues to provide the world with new conveniences and means of amusement, we shall be many æons in reaching the day dreamed of by the regenerators of society, when the doors of the law courts shall be closed and the tongues of lawyers wag no more. Every new invention seems to result in new rules of law, or the reconsideration and reapplication of those already established. The use of the aeroplane, for instance, has led us to review the fundamental principles of the law of property, and in a recent case the dignified members of the Supreme Court were obliged to mingle with the crowd which looks upon the moving-picture show as a matter of moment. In *Kalem Co.* v. *Harper Bros.*, decided last month, it was held that a public exhibition of moving pictures of Ben Hur infringed the right of copyright in the book of that name. The gist of the question was whether such moving picture exhibition is a drama. In delivering the opinion of the court Mr. Justice Holmes said: "We are of opinion that Ben Hur was dramatized by what was done. Whether we consider the purpose of this clause of the statute, or the etymological history and present usages of language, drama may be achieved by action as well as by speech Action can tell a story, display all the most vivid relations between men, and depict every kind of human emotion, without the aid of a word. It would be impossible to deny the title of drama to pantomime as played by masters of the art. But if a pantomime of Ben Hur would be a dramatizing of Ben Hur, it would be none the less so that it was exhibited to the audience by reflection from a glass, and not by direct vision of the figures — as sometimes has been done in order to produce ghostly or inexplicable effects. The essence of the matter in the case last supposed is not the mechanism employed, but that we see the event or story lived. The moving pictures are only less vivid than reflections from a mirror. With the former as with the latter our visual impression — what we see — is caused by the real pantomime of real men through the medium

of natural forces, although the machinery is different and more complex. How it would be if the illusion of motion were produced from paintings instead of from photographs of the real thing may be left open until the question shall arise."

An Unlamented English Judge.

THOSE who think that English judges are entirely immune to adverse criticism and that the attitude of the British bar and press towards the bench is deferential almost to the point of servility will be surprised to read the comments of the *Manchester Guardian* on the late Mr. Justice Grantham. He will be remembered as the judge whose impeachment was suggested some years ago on the ground of his partisan bias in election cases. The current saying at the Liberal clubs in London was that he was "worth two seats to the Unionists after a general election." The late premier, Campbell-Bannerman, referred to him during the debate on the Yarmouth election petition in the House of Commons as "an honest, straightforward, amiable gentleman, against whose moral character no one who knows him would have a word to say. He is undoubtedly a partisan, and an outspoken and intemperate partisan." But to the legal profession, says the *Guardian*, he appeared in another and less picturesque light — that of sheer inefficiency. He was the worst of three or four contemporary common-law judges who have fallen much below the standard which it is reasonable to expect and which should be easy to secure. Quite apart from politics, he had a wholly unjudicial mind. He knew little law, had no judicial shrewdness, and could never see two sides to any question. Early in a case he would espouse one side — by what guided it was impossible to say, let alone forecast — and for the rest of the trial he would build up a mountain of prejudice in that direction, to be hurled at the jury at the end with all the prestige of an old judge whom it was difficult for them to suspect of such amateurishness as really characterized him. A nonpolitical trial under such auspices was often a pure lottery, a thing of dread for those members of the bar who had to face it. It discouraged litigation, but nothing else could be said for it. It is rather tragic for sincerity to be able to find nothing warmer than this to say of the death of an English judge. The blame does not really rest with Mr. Justice Grantham himself — for, being what he was, he could not have done otherwise than he did — but with those who, in raising him to the bench, forgot, for the moment, to take thought for its efficiency and credit. In these days when the recall of judges and the respective merits of the appointive and elective systems are hotly debated questions it is interesting to note that the British journal also says: "His long career certainly raised seriously the question of limiting the immortality of judges."

Laborers Worthy of Their Hire.

"NOWHERE," said Ambassador Bryce in a recent address, "does the smooth working of the machinery of government so much depend as it does in the United States upon the integrity and ability of the judges." Yet there are those who object from press and platform against increases in judicial salaries on the ground that the remuneration already received is so many times that of a clerk, mechanic, or laborer. It ill becomes a great nation to be niggardly in such matters.

The Boomerang of Over Legislation.

DISRESPECT for law, says Senator Borah, is "our national sin, pervading all classes and fastening its demoralizing hold upon all our institutions." And very pertinently, we think, the New York *Evening Sun* advances as one cause of the condition the too frequent enactment of laws which are insufficiently supported by public opinion. If it be not too much of a bull we would suggest the passing of a statute providing for the punishment of the man, and in this case the woman too, of course, who has acquired the habit of saying: "There should be a law against it." Owing to the zeal of self-appointed reformers our statute books are encumbered with acts curtailing individual freedom. There is nothing about which men differ more widely than the minor problems of morality, and no greater mistake can be made than to permit a section of the public to make use of the legislature as a means of converting people to their ideas as to the true road to salvation. Statutes which prohibit acts practiced by large numbers of the respectable portion of the community, and the continuance of which is not obviously detrimental to the public welfare, have not been and cannot be successfully enforced. And every such law which is ignored or winked at breeds disrespect for law in general. It is of course difficult to say just in what particular instances individual freedom of action injuriously affects the welfare of society in general to such a degree as to render a prohibitory act necessary, but there is no doubt in the minds of unemotional thinkers that the line can be drawn at a place which will exclude many, and very many, of the "Thou shalt not" acts from the statute books. A man of wealth might confer a boon upon society by endowing a bureau for the study of the history and effect of such laws. The benefits of their researches would reach us but slowly and indirectly, and their reports would be more suggestive than conclusive. "It is not only impossible," said President Gregory of the American Bar Association in a recent address, "to anticipate or forecast with absolute certainty the effect upon society of a contemplated statute, but so complicated is the problem, it is often impossible to determine accurately by any strictly scientific test, what has been the effect of legislation long in force." But the data furnished by such a bureau would at least put the conscientious and broad-minded legislator in a better position to vote judicially than he is at present. Upon the sentimentalist and the fanatic it could scarcely be hoped to exercise much effect.

Declaration of Dividends as Fraud.

IN the interests of the investing public, which includes pretty nearly all of us nowadays, it is to be hoped that the decision of the New York Court of Appeals in *Ottinger* v. *Bennett*, 203 N. Y. 28, will be followed in other jurisdictions. The case appears to be one of first impression and will probably be a leading authority on the subject of fraud. It came before the court on a demurrer to a complaint in an action for fraud and deceit, and the Court of Appeals, which adopted the dissenting opinion of Mr. Justice Miller of the Appellate Division, held in effect that the publication of the payment of a dividend on the capital stock of a corporation, where the dividend had been, in fact, paid out of the capital stock and not from surplus or profits, is a false representation, especially

where such a dividend is prohibited by statute, and if so paid and declared for the purpose of inducing the public to purchase shares of the company in the belief that the dividend has been earned, will entitle a person who has been led to purchase stock on the faith of such representation to damages for fraud. With sound sense Mr. Justice Miller said: "A declaration of a dividend by a going concern implies earnings from which to pay it, and the publication of the fact of such declaration is certainly calculated to induce the public to believe that the dividend has been earned and that the corporation is prosperous. If, intending the public to act thereon, the defendants had made and published a report expressly stating that the dividend declared had been earned, there would be no doubt of their liability to a person thereby deceived to his injury. The familiar cases of false prospectuses need not be cited. Why distinguish between a false affirmation and an act calculated to have the like effect, the motive and the result in each case being the same? Certainly the law makes no such distinction. We have had many illustrations in cases before us of the devices to deceive the public employed by managing directors, who misuse their positions to promote stock speculation, and the payment of dividends out of capital is a familiar one. When that is done to induce the public to purchase shares of the company and thereby to create a fictitious value, upon which the wrongdoers may trade, they should be held accountable precisely as though the like deception had been practiced by actual misstatements." Such law the layman would call good horse sense. Let us have more of it.

Edison's Odd Job.

ONE Thomas A. Edison is reported to be finding recreation in working on an industrial plan to take the place of the Sherman Act. The idea of even an Edison spending his spare moments on such a task is scarcely complimentary to the American lawyer. We thought we had some intellectual giants in the legal profession itself. But they appear to consider the invention of a satisfactory substitute for the Sherman Act a full day's work. If the report be true, perhaps Mr. Edison will be able to solve the divorce and servant girl problems some rainy Sunday afternoon.

Guarding the Gate.

THERE are gratifying indications that the days of easy entrance to the ranks of the legal profession are rapidly drawing to a close. It will soon, we hope, be no longer possible in any State to obtain an attorney's license on answering a few questions on elementary law in open court and producing a certificate of character signed by two or three friendly and indifferent members of the bar. The new rules in New York provide not only for an extended period of study, but also require that the candidate's moral qualifications shall be sworn to by two attorneys who are personally known to at least one member of the Bar Association's character committee, and such affidavit must state specifically the details of the affiant's knowledge of the applicant. A plan for the thorough investigation by the Chicago Bar Association of the character of applicants for admission to the Cook county bar has been adopted recently. Such examples should be followed in other cities and States. The requirement of large admission fees, such as are exacted by the Bar Association of the Canadian provinces, is inconsistent with the theory of our institutions, but there is nothing undemocratic in denying the right to practice law to all applicants, poor as well as rich, who cannot demonstrate their intellectual and moral fitness to enter the profession.

Lawyers on Defects in the Law.

WHILE we believe that the advocates of the literal construction of statutes are barking up the wrong tree, there is no doubt that the popular idea that legal distinctions are thin to the point of attenuation, and that legal procedure is unnecessarily complex, is supported, in respect to some branches of the law at least, by very eminent authorities. In an interview given to a New York paper on his recent visit to that city, Sir Frederick Pollock is reported to have said that the rules of evidence had been developed to a point of refinement with us unknown in the English courts. And in respect to the English rules as to the admission of evidence, one of the greatest of modern trial lawyers, the late Lord Chief Justice Russell of Killowen, said in *Arkinson* v. *Morris*, 75 L. T. (N. S.) 440: "It is to be observed that the rules of evidence which prevail in this country are much less liberal and wide than those that prevail in many other enlightened countries, and that our rules of evidence shut out large bodies of testimony received, and I must confess, speaking for myself, I think properly received, in other countries — evidence which has great cogency and force."

Readers of one of the classics of our legal literature, Thayer on Evidence at Common Law, will no doubt remember that he ascribes the peculiarities of the common-law system of evidence, as distinguished from that of foreign countries, to the continued use of the jury. In an address on "The Progress of the Law in the United States," delivered last summer before the Colorado Bar Association by Frederick N. Judson, that distinguished lawyer said: "The investigations into historical jurisprudence have disclosed that extreme technicality is the sign of an undeveloped system of law, in which legal rights are subordinate to the procedure to enforce them, wherein the substance is secondary to the form. Centuries ago, the main business of the courts was in ascertaining rules that the litigant should follow this established form or that, and according as he bore the test, he should either be punished or go acquit. Formalism in the early stages of society was a step, but one of the first steps, toward a rational system for determining controversies. It was better than private war. Thus the determination by chance or wager of battle was an advance upon the primitive state where men took the law into their own hands. The important fact, therefore, in this progressive development of our jurisprudence is the growing recognition that the demand for simplicity in procedure does not spring from ignorant reformers or radical iconoclasts, but is a progressive step in a rational advance of progressive jurisprudence. Forms were regarded with superstitious reverence in the early stages of society, but we now recognize that the simpler the procedure, the better it serves the purpose."

"EVEN a dog distinguishes being stumbled over and being kicked." Holmes, The Common Law, Lecture I. (p. 3).

Litigation under English Workmen's Compensation Act.

THE idea seems to prevail among some sections of the public that the passage of Workmen's Compensation Acts will put an end, practically speaking, to litigation between employers and employees arising from the death or physical injury of the latter. We have no wish whatsoever to put any hindrances in the way of the enactment of this highly desirable legislation, or of the procuring of whatever constitutional amendments are necessary to validate it. But lest any enthusiastic advocate of these acts should form too roseate hopes as to their efficacy in entirely checking such litigation, it may be well to mention that of the nine cases before the House of Lords reported in the last part to hand of Appeal Cases for 1911, no less than five involved the interpretation of the English act on the subject. It was passed in 1906.

Proof of Handwriting.

IN the December *Illinois Law Review*, Mr. A. S. Osborn, the author of "Questioned Documents," makes a plea for a change of the old and much discredited rule still prevailing in the federal courts and in those of certain States which prevents proof of handwriting by comparison with genuine specimens. "More than one victim of a fraudulent writing," says Mr. Osborn, "has found to his utter consternation that in all courts in numerous States, and certain courts in all the States, such a paper could not be proven to be what it is by bringing in genuine writings with which it might be compared." The abrupt termination of the famous "pen poison" case of Easton, Pa., forcibly illustrates Mr. Osborn's argument. This is the case in which a woman was placed on trial for sending unsigned scurrilous letters through the mail to the pastor of an Easton church. Judge McPherson reluctantly held that the prosecution could not offer in evidence a specimen of the defendant's writing which had been obtained by a postal inspector during his investigations, and the prosecution was thereupon compelled to abandon the case. In making his ruling Judge McPherson said: "I am compelled to rule the document out. In criminal cases, the United States courts are working under laws passed more than a century ago, the origin of which dates so far back that the reason for them must have long since disappeared. Personally, I believe that the evidence should be admitted. Under the State law it would be. I have absolutely no sympathy with the ruling, but I am bound by it until Congress sees fit to make a change." "England," says Mr. Osborn, "ended the old practice by statute fifty-seven years ago; New York in 1880; Pennsylvania in 1896 passed a similar statute, and New Jersey and numerous other leading States have in the same manner but recently set aside this strange rule of law. In Massachusetts, Connecticut, Ohio, Kansas, and a few other States — let it be said to their credit — the courts themselves have changed the practice. But in criminal cases in the federal courts throughout the whole country and in all courts in a number of States, the old middle-age practice continues and standards of comparison, no matter how essential nor how well proved, cannot be introduced for the purpose of comparison. This unfortunate old practice is still continued by the great States of Michigan, Indiana, and Illinois."

The Punishment of Crooks.

THE late Mr. Barnum once made a statement to the effect that the ultra-gullible section of the community receives a new recruit every minute. He was thinking of harmless amusements. Burr Brothers, who made a criminal and extremely profitable application of the dictum, are now serving a one-year term on Blackwell's Island. Would it not be well to increase the penalties of the law with a view to keeping such experts in piratical finance out of harm's way, and the reach of their money bags, for twenty years at least?

An Opportunity for Female Jurors.

WHEN will juries learn that their duty is to ascertain the facts regardless of sympathy for the accused or detestation for the moral character of the victim or prosecutor? In some recent conspicuous trials verdicts of acquittal were obtained because the juries obviously placed the victim as well as the prisoners on trial and found that the former failed to measure up to a desirable standard of conduct. It is impossible of course for one who has not closely attended to all the evidence as given in the court room to be sure that a verdict is wrong. The umpire is in a better position than the fan in the grandstand to decide whether the batter is out. Yet an almost unanimous expression of dissent on the part of disinterested spectators is presumptive evidence at least that some one has blundered. In a case recently tried in New York the opinion of the very great majority of those who followed the testimony, as reported in the papers, was that the accused women had shot their man without legal excuse. The jury, however, evidently took the private record of the victim into consideration, decided they did not like it, and taking the law into their own hands brought in a verdict of not guilty. In Denver a woman was recently acquitted of murder on apparently similar grounds. Now if A's right to shoot and if necessary kill B is to vary inversely as the latter's character improves, the strait and narrow path may become a favorite boulevard, but existence will be somewhat insecure until its popularity is firmly established. It is to be noted, of course, that the prisoners in the cases referred to were women. Evidently the coolness of reasoning supposedly characteristic of the masculine mind was overcome by a rush of sentimentality. When women jurors come to try such cases they will have a rich opportunity to show their superiority to their male brethren. Let us hope that they will avail themselves of it.

Law Books by the Foot.

IN Barrie's charming comedy, "What Every Woman Knows," one of the self-made Scotch brothers points with pride to his library as the fulfilment of an order for fifteen feet of the best books that could be bought. The size of the modern legal text books suggests that it will be in something of the same manner that the lawyer of the future will have to make his purchases. A recent edition of a work on corporations is in seven volumes, totaling 8,790 pages, in short, almost two feet of printed matter, including binding. A work on negligence, nearly two more feet of printed matter, is also in seven volumes, and contains 7,741 pages. Unless some means be found to

check this tendency to write legal Olympics, the sale of text books to private libraries will be a thing of the past. Perhaps that evil day will be postponed for a time by a resort to India paper editions.

Lawyers as Jacks of All Trades.

NOT only should the gateway to the profession be well guarded, but some rules should be devised, if possible, not inconsistent with constitutional provisions, which will prevent a practicing lawyer from engaging in pursuits, which, although not immoral, and perhaps useful in other hands, are derogatory to the dignity of a lawyer. The attorney, for instance, who acts as and charges for his services as a private detective in a divorce suit is deserving of professional ostracism. Mr. Justice Goff of New York recently referred in scathing terms to one such "ornament" to our ranks, and his honor's castigation can well bear repetition.

Vanishing Gretna Greens.

SINCE Jan. 1, no person wishing to commit matrimony in the State of Massachusetts can obtain a license until after his notice of intention has been on file for five days. Maine, New Hampshire, Vermont, and Rhode Island have all passed similar laws, and Connecticut contemplates falling into line. This is seizing the stick by the right end.

THE PLEA FOR LITERAL CONSTRUCTION.

TRULY are we a nation of lawyers, amateur and professional, and it seems that the former class is now enjoying its day. In no other country, probably — certainly in no other English-speaking community — are the decisions of the courts so much a matter of popular comment and concern as they are with us. The fact that our constitutional questions are legal problems, and not merely political issues, as in Great Britain, has long accustomed the layman to scan with interest the opinions of our judges. They occupy in the daily newspaper the position of prominence given to the reports of parliamentary debates in the English press. Lately, however, the interest of the people, or a large section of them, has extended beyond the mixed political legal problems resulting from a written constitution into what may be regarded as the purely technical fields of law. The layman has undertaken the by no means easy task of defining the proper method of construing statutes. "Literal interpretation" and "Away with judicial legislation" are his battle cries.

Now much of the popular dislike of legal theories and procedure is undoubtedly justified — eminent members of the profession, men of culture and broad outlook, admit it — but in respect to the current criticism of the methods of statutory construction the critics of the courts certainly seem to be looking in the wrong direction. It is the very habit of construing statutes too literally that has resulted in the technicalities and the consequent frequent miscarriage of justice of which they complain. Penal statutes are those which are interpreted most strictly, and it is in the administration of the criminal law that most fault is found. The fundamental rule of statutory construction was that stated by Mr. Justice Swayne in *U. S.* v. *Hartwell,* 73 U. S. 385: "The object in construing penal, as well as other statutes, is to ascertain the legislative intent. That constitutes the law. If the language be clear it is conclusive. There can be no construction where there is nothing to construe. . . . The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature." That, our critical friend will probably reply, is just what the courts so frequently refuse to do, and the simple answer to him is that the deviations from the rule proceed in the very great majority of instances from a too close adherence to the letter of the act. Language, while the only procurable vehicle for the conveyance of ideas, is nevertheless a treacherous carriage, and the composite mind of even the wisest of legislatures is far from omniscient; contingencies arise and innovations are made which would undoubtedly have been within the intent of the statute had they been in existence at the time of its enactment, but which would be excluded from the application thereof by a strictly literal interpretation. Would the strict constructionist contend that the word "carriage" must in no case include automobile, the word "vehicle" an aeroplane, or the expression "written instrument" one executed on a typewriter? Yet to such absurdities would we be led were many statutes passed years ago and still in force literally construed.

The legislature must either be continually revising all our statutory law in the light of every new invention and new development of social and commercial conditions, or we must leave it to the courts to determine what they meant or what they would have meant had they been possessed of the knowledge of the state of affairs in existence at the time the application of the statute is called for. Moreover the strict constructionist would have to contend that the Supreme Court erred when it held in the Trinity Church case that the legislature did not have clergymen in mind when it legislated in respect to any foreigners under contract to perform labor or service of any kind, and that it also erred in *U. S.* v. *Kirby,* 7 Wall. 482, when it held that a sheriff, in arresting under a warrant a mail carrier, did not incur a penalty provided by the act against any person "knowingly and wilfully obstructing the passage of the mail." Perhaps the literal constructionist would hold that the old law of Bologna, providing that "whoever drew blood in the streets should be punished with the utmost severity," should have been held applicable in the case of a surgeon who operated in the street upon the patient who needed his immediate attention. Illustrations of the same kind are too numerous to mention. Were it not that some prominent public men and lawyers are to be found in the forefront of the ranks of the literalists, the subject would seem too elementary to deserve treatment in the columns of a law journal. The fact is, it is inevitable that the courts in applying laws should apparently encroach on legislative functions. Until we invent a new language and discover or develop a new type of human mental machinery to which we may intrust the duties of legislation, the absolute separation of legislative and judicial functions must necessarily remain an ideal to be always kept in mind but never with the hope of attainment.

RESERVATION OF TITLE AS AFFECTED BY BANKRUPTCY.

THE amendment of June 25, 1910, to section 47*a* (2) of the Bankruptcy Act, provides that the "trustees, as to all property in the custody or coming into the custody of the Bankruptcy Court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the Bankruptcy Court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied." This language is clear and comprehensive; it unequivocally gives to bankruptcy proceedings the force and effect of a lien, and makes them a caveat to all the world, and in effect an attachment and an injunction (190 Fed. 871). Although the amendment was made to section 47*a* (2), which concerns the trustee's duties, it will operate as if it were made to section 70*a*, which specifies the property to which the trustee takes title. The effect of this legislation is to make the trustee a lien creditor, in addition to his "standing in the bankrupt's shoes." The need of it was found in those decisions which held that the trustee was not entitled to such rights; that at most he was a mere general creditor, and was not entitled to the protection afforded to lienholders by the State laws.

This amendment is principally beneficial in that it, following the course pursued by other amendments of the Bankruptcy Act, has adopted the better view of conflicting decisions on the question involved therein. Although it has been much heralded, there is really nothing radical, startling, or even new, in it. It will, of course, be a great aid in protecting the estate of bankrupts from agreements which, although they would have been useless as against lien claimants, were held to be good as against the general creditors. Beyond that, it does not seem to go (189 Fed. 236). It would have been more to the point if our legislators had taken up the general question of the secret reservation of title in grantors. That question is now a source of annoyance to litigants, because of the mass of contradictions which necessarily result from following the law of the State. In some States those reservations are valid; in others they are void; in some they are valid only for some purposes and to a certain extent; in others they are, or are not, valid according to the form they assume; the result being that the great boast of "equality" is, as to these transactions, a myth. We assume that the wisdom, if such it is, of allowing this condition to exist, is based on the theory that it would be unwise to get away from section 721, U. S. Rev. Stat. (4 Fed Stat. Annot. 517), which provides for the following of the State laws and rules of decision; but that section was never meant to cover a bankruptcy law; and there is no reason why such national legislation should not cover these matters for itself; indeed, all the reason is that it should do so.

As an instance let us consider what we will call a "sale under an agreement of trust." From all we can learn, these transactions are merely sales plus the signing of a paper by the vendee (euphoniously designated trustee) which provides substantially that "until sold or paid for in cash by the vendee the property shall remain the property of the vendor; and, when sold, all the proceeds of the sale, including cash, notes, and open accounts, and the collections therefrom, shall be kept separate and held by the vendee as a trust fund, and turned over to the vendor as collateral security and pledged until the entire indebtedness of the vendee has been paid." Agreements of this nature have been sustained in *In re McGehee,* 166 Fed. 928; *Wood* v. *Eubanks,* 169 Fed. 929; *In re J. M. Acheson,* 170 Fed. 430; *Wood* v. *Vanstory,* 171 Fed. 375. In the case of *Wood* v. *Eubanks, supra,* it was distinctly decided that such an agreement was neither a mortgage nor a conditional sale, and was not required to be recorded as would be the case if it were either of these, but that it was a valid trust. These decisions are entirely justified under the State law, and the question is whether this matter should be remedied by the next amendment of the Bankruptcy Act. It is perfectly clear that these alleged trust agreements are purely matters of form; that they differ in no material respect from conditional sales or other reservations of title, and are resorted to merely because the State law says they are good. We are informed by Lewin, in his work on trusts, that the parents of trusts were fraud and fear, and that a court of conscience was the nurse. Mr. Blackstone intimates that a trust is a "child of the imagination;" but, unless relieved by Congress, this grade of imagination will continue to defeat honest creditors in some of our States.

In *In re Levin,* 127 Fed. 886, the court said: "It is undoubtedly true that the form of the transaction is of little consequence, if the real purpose behind it is to cover up the vendee's true interest in goods that have come into his possession, and thus to enable the vendor to gain an advantage over other creditors to which he is not in truth entitled." Of course that case was not one of "trust agreement," but there is no sound reason why the language would not apply with just as much force if it were. As was said in *In re Poore,* 139 Fed. 863, "there is no occasion to be astute in upholding such instruments [an alleged bailment], which in nearly every case are intended to get around the law."

E. T.

BANK GUARANTY LAWS.

THAT a State may constitutionally levy an assessment on banks within its territory for the purpose of creating and maintaining a fund with which to pay the claims of the depositors of any bank which may thereafter become insolvent, is settled by the case of *Noble State Bank* v. *Haskell,* 219 U. S. 104. The Supreme Court had under consideration in that case the Oklahoma Bank Depositors' Guaranty Fund Acts, which levied upon every bank existing under the laws of that State an initial assessment of one per cent. of the bank's average daily deposits, and after the suit was brought the assessment was raised to five per cent. The court was unanimously of the opinion that the act was sustainable under the police power of the State, which, the court said, "extends to all great public needs," and did not, therefore, violate the "due process of law" clause of the Constitution. That case was followed in its companion cases of *Shallenberger* v. *First State Bank,* 219 U. S. 114, involving the validity of a similar act of the Nebraska legislature, and *Assaria State Bank* v. *Dailey,* 219 U. S. 121, involving the validity of a similar act of the Kansas legislature. The de-

cision of the court being unanimous in all of the cases, it is not for any mere lawyer to question the soundness of the reasoning employed in sustaining the acts. Indeed it is almost impossible, in any case, to say that a holding that a "comparatively insignificant" taking of property is a proper exercise of the police power is not based on sound reasoning, for as Mr. Justice Miller, speaking of the police power in the *Slaughter House Cases,* 16 Wall. 62, said: "This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property." The broad scope of the police power was thus stated by Mr. Justice Brown in *Lawton* v. *Steele,* 152 U. S. 133: "It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the State may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectional trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill-fame; and the prohibition of gambling houses and places where intoxicating liquors are sold." And the learned judge concluded with the omnibus statement that "beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests."

The arguments of the learned counsel for the bank against the validity of the act under consideration in the case of *Noble State Bank* v. *Haskell,* which the court held were untenable, are strong against the policy of such acts. That a bank with great resources and a reputation for business integrity should be compelled to contribute to a fund which must necessarily place wildcat banks and banks of less sound financial standing upon the same footing with it in bidding for business, thereby depriving the bank with a reputation for soundness, which is one of its best assets in getting business, of that reputation, seems to be a strong argument against the advisability of enacting such legislation. The only persons supposed to be benefited by the acts under consideration in the Supreme Court cases above mentioned were the bank depositors. The relation between the bank and a depositor is that of debtor and creditor, and is voluntarily brought about by the action of the depositor, who usually takes into consideration the liberality of the bank and its soundness. The depositors' guaranty acts remove the last consideration mentioned, and the depositor may now choose, without chance of loss, the bank offering the greatest inducements in the way of rates of interest, etc., which is usually the bank which is least strong in resources; the ultimate loser, under the act, is the bank which, by honest dealing and careful business methods, has acquired a reputation enabling it to do business without the benefit of a guaranty act, and the persons ultimately benefited are the banks with questionable business methods and weak resources. Any act which is calculated to act as a boon to dishonest business methods and a ban to integrity in business is the just subject of righteous condemnation.

G. M. L.

THE NEGLECT OF PATIENTS IN HOSPITALS.

IT is a rather curious circumstance, having regard to the munificent provision of hospitals and infirmaries in this country, that so little case law is to be found bearing on the rights of a patient against the hospital authorities for neglect. It is no part of our purpose to suggest reasons for this. Certainly it would be impossible to say that hospitals did not share in the common mundane tendency to make mistakes. Whatever may be the explanation, it will be found that, with the exception of two comparatively recent cases, the valuable dicta of earlier date on the principles which govern the relationship of the hospital and patient are of American origin.

Under these circumstances the fact that a new and rather striking decision has lately been reported in Scotland in the case of *Foote* v. *Shaw, Stewart and others* (*Directors of Greenock Hospital and Infirmary*), 49 Sc. L. Rep. 30, is one worthy of some notice, not the less so that it was determined on an appeal from the Lord Ordinary by a court composed of Lord Dundas, the Lord Justice-Clerk, and Lord Salvesen. The negligence in respect of which these proceedings were instituted was alleged to be that the hospital medical staff treated a lady for a sprained knee instead of for a broken thigh. In both the English cases to which we shall subsequently refer the treatment afforded by the hospital was gratuitous, though in one of them the defendants had a power to charge under the Public Health Act (1875), § 132. In the Scottish case the lady was received as a paying patient at a rate of two guineas a week. This arrangement was made by the hospital house surgeon, and it was alleged to represent board and medical treatment. The lady urged that she had been handled negligently and unskilfully, and claimed damages. Having regard to earlier decisions, it was argued that there was here a special contract to treat the lady for the injuries she had received, and not merely to procure the services of a competent staff. It is a rather curious feature of the case that one of the objects sought by the lady's own medical adviser in sending her to the hospital was the application of X-rays in order to determine the precise nature of the injury. These rays were not applied, and no point seems to have been made as to the circumstance, although presumedly their application would have resulted in a shadowgraph such as would have shown at once that injury far more serious than a sprain had been sustained. The court refused to read into this arrangement anything more definite than that, in addition to the usual scale of board and treatment, the hospital would supply the services of a competent staff of medical men, and it absolutely refused to admit that the two guineas insured a special degree of medical care and attention or any guarantee of skill on the part of the house surgeons. The court appeared to entertain a plain view that the averments in the pleadings were not strong or explicit enough.

This case not only follows the two English cases to which

we will now shortly refer, but seems somewhat to go rather further. In *Hillyer* v. *Governors of St. Bartholomew's Hospital,* 101 L. T. Rep. 368; (1909) 2 K. B. 820, the plaintiff was himself a doctor who had been gratuitously examined under an anæsthetic, and on recovery found that one arm had been badly bruised by some one leaning upon it, and that the displacement of some of the heating apparatus of the operating table had burned the other arm. Negligence was alleged on the part of some member of the hospital staff. An obvious difficulty confronted the plaintiff in that, being himself insensible, he could give no valuable evidence on the crucial points. The Court of Appeal held that no action was maintainable. Lord Justice Farwell states the principle which seems to govern these cases. Hospitals are only subjected to the duty of using due care and skill in selecting their staff, and in the particular instance it is noticeable that the patient entertained a special feeling of confidence in the surgeon who performed the operation, and went to the hospital in question in order to gain the benefit of his opinion, and, as is well known, the nurses or other attendants are in such supreme crises under the direct control of the operating surgeon alone, and cease (*pro tem.*) to be the servants of the hospital. Lord Justice Kennedy puts the point thus: "The legal duty which the hospital authority undertakes towards a patient, to whom it gives the privilege of skilled surgical, medical, and nursing aid within its walls, is an inference of law from the facts. In my opinion it is not the ordinary duty of a person who deals with another through his servants or agents and undertakes responsibility to that other person for damage resulting from any injury inflicted upon him by the negligence of those servants or agents. In my view, the duty which the law implies in the relation of the hospital authority to a patient and the corresponding liability are limited." The learned lord justice proceeds to lay it down that the undertaking is that a patient shall be treated only by experts, whether surgeons, physicians, or nurses, of whose competence professionally the hospital authorities have taken reasonable care to assure themselves, and, further, that these experts are to have at their disposal all fit and proper appliances and apparatus.

Though the authorities are not in this view then liable in respect of any negligence of members of the professional staff either in reference to the operations they perform or in their neglect to use the fit and proper appliances, quite different considerations apply when ministerial or administrative matters are concerned. In matters connected with the attendance of nurses in the wards, the means of communication with medical aid in some emergency, the food supply, and such things as sanitation, the hospital authorities are responsible for the sufficiency, adequacy, and observance of rules and regulations.

In *Evans* v. *Liverpool Corporation* (1906), 1 K. B. 160, the facts were simple, but rather on different lines to the cases already cited. The negligence alleged was the discharge of a child from hospital before he was free from the possibility of communicating scarlet fever to his brothers on his return home. The doctor who had discharged him had been appointed subject to rules which made him responsible alike for the treatment of patients and also "for their freedom from infection when discharged." Great reliance was placed on these words, but Mr. Justice Walton did not construe them as showing that a discharge by the doctor was a discharge by him as a servant of the defendants for whose mistake they were liable. Assuming that a negligent mistake had been made, the learned judge still thought that the defendants were not responsible.

It is not very important to discuss American and colonial decisions now that we have three such modern cases of home extraction upon which to form a definite opinion. The case of *Glavin* v. *Rhode Island Hospital,* 34 Am. Rep. 675, is probably the parent of these more modern cases, for it runs on the same general lines of reasoning, whereby the doctors are held to be selected by the hospitals, but are not thereby necessarily their servants, even although the hospital can discharge them. (See also *Auckland Hospital, &c.* v. *Lovett,* 10 N. Zeal. L. Rep. 597.) *Hall* v. *Lees,* 91 L. T. Rep. 20; (1904) 2 K. B. 602 — another British case — was a case where the plaintiff sued a nursing association for injuries sustained through the negligence of nurses supplied by them. The facts are different from those in the cases already mentioned, but the same principle seems to be at work, and the Court of Appeal held that the association merely undertook to supply nurses, and, in selecting them, to exercise all reasonable care and skill to insure their competence and efficiency.

It should be no one's wish to expose the authorities of hospitals to the worry and expense incident to opening the doors too widely to actions for damages against them, more especially when it is borne in mind that cases only reach these institutions, as a general rule, when the position is extremely critical. It is not, however, to the real benefit of any institution, however benevolent in its scope and though advised by expert professional opinion, that it should not be amenable to the driving force of criticism when mistakes have been made in fact. Public bodies in other capacities have become liable for negligence of servants much as private individuals are, even though acting in the performance of public duties, and there is not absent some taint of technicalities in the reasoning which negatives the relationship of master and servant between the hospital authorities and the group of persons who stand round the operating table and its insensible burden. Whether a fair and reasonable distinction could be drawn between the case treated gratuitously and that treated for reward is a question for others to consider. The line of cases already set out indicates that the patient must pin his faith on the doctors and nurses, and must expect to find obstacles in recovering against the hospital should any untoward mistake be made in regard to his treatment. In the complexity of modern surgery medical men are peculiarly liable to charges of negligence from armchair critics. The degree of skill a practitioner must evince is not such a thing as any court can determine in language of precision. Medical men — as Chief Justice Erle said in *Rich* v. *Piermont,* 3 F. & F. 35 — need not be answerable because some other doctor might possibly have shown greater skill or knowledge, nor is a man necessarily liable if even he could have exercised greater care. The question, therefore, that the hospital authorities have to solve in determining whether a medical man is competent is one admitting of no ready answer. Errors of judgment must occur from time to time, although this must come as cold consolation in such cases as those in which life-long injury has followed the omission of some trivial precaution.— *Law Times* (London).

JOHN BIGELOW.

JOHN BIGELOW, diplomat, author, journalist, and lawyer, died in New York city on Dec. 19, 1911, in his ninety-fifth year. John Bigelow was born at Malden, N. Y., on Nov. 25, 1817. He left Union College at the end of his senior year, went to New York city and applied himself to the law as a student in the office of the then prominent Robert Sedgwick. He was admitted to the bar in 1839. For some years thereafter he divided his time between legal practice and literary effort. He contributed to two or three journals of the day. Gov. Silas Wright gave to Bigelow in 1844 his first public appointment, that to the position of inspector of Sing Sing prison.

In 1849 Bigelow went into the office of the *Evening Post* and presently became its managing editor and part owner, in company with William Cullen Bryant. During the decade preced-

ing the Civil War, Bigelow found time for much enterprise outside his newspaper. He made two trips to the West Indies, one to Haiti, and one to Jamaica. Each resulted in a book. That on Jamaica bore largely on the slavery question, and was entitled "Effects of Sixteen Years of Freedom on a Slave Colony."

The election of Abraham Lincoln and the upspringing of the rebellion in 1861, translated Bigelow from the sphere of secondary politics to a position of very active service for the Union. Lincoln appointed the Democratic editor Bigelow to the position of United States consul-general at Paris. There Bigelow served throughout the years when the Union feared the possible action of France in favor of the South.

He filled the posts successively of consul-general, of chargé d'affaires and of minister. He served at first as a subordinate in the task of checking and curbing the French sympathizers of the South who were strong and had the support of the Empress Eugénie. Later he represented his country in that interesting bit of diplomatic intercourse which resulted in the withdrawal of French troops from Mexico at the end of 1865.

During the years when North and South were at grips in the neighborhood of Mason and Dixon's line, the Monroe Doctrine went into temporary abeyance. The troops sent by Napoleon III. in the interest of French bondholders seized Mexico and installed Maximilian as emperor. It was Bigelow's task as ambassador to convéy the message which resulted in the peaceable withdrawal of the French regiments without need for a resort to force.

In 1866 Bigelow was succeeded in Paris by Governor Dix, and returned to New York. During his stay in Paris he had found time, outside of his exacting diplomatic labors, to carry on literary and social pursuits that made him for many years the best-known American in Paris. He formed personal friendships with many of the statesmen of the day. He carried on a brilliantly successful research into the French relics of Benjamin Franklin. His studies of Franklin's stay in France yielded up the original manuscript of Franklin's autobiography, the most important Franklin document in existence. A portrait of Franklin, apparently the best of his likenesses, was also found. Bigelow published the "Life of Benjamin Franklin" some years later, in 1875, including the autobiography.

While in Paris Bigelow published in French a writing entitled "Les Etats-Unis en 1863." His other works connected with the Paris stay are "Some Recollections of Antoine Pierre Bourger," "France and Hereditary Monarchy," and "Some Recollections of Laboulaye."

Following the death of Henry J. Raymond of the *Times*, Bigelow contemplated forming a connection with that newspaper, and did indeed for a brief time act as its managing editor. His further labors were, however, mainly in the direction of public service within his own State of New York. He wrote on the subject of the State canals, and in 1875 was appointed by Governor Tilden a member of the canal commission. He was elected secretary of state of New York in the following November.

Under Cleveland, in his first term, Bigelow was appointed assistant treasurer of the United States. His literary labors at this time were many. "France and the Confederacy" was published in 1888, and contains many interesting facts of which Bigelow was the particular possessor. "Molinos the Quietest" appeared in 1882. In 1886 Bigelow visited the French canal enterprise at Panama upon the invitation of De Lesseps, the engineer. In 1888 he was appointed by Cleveland commissioner to the Brussels Exposition. In 1893 he was nominated a delegate to the convention to revise the constitution of the State of New York.

Here the public labors of Bigelow cease, with the exception of his work as trustee of the New York Public Library. Much of the credit for the consolidation by which the Astor, Lenox and Tilden foundations were merged into one organization, and the present quarters built, is attributed to Bigelow. He was an executor and trustee under the late Samuel J. Tilden's will, and was president of the board of trustees of the New York Public Library, Astor, Tilden, and Lenox foundations. He was probably the most striking figure at the opening of the New York Public Library's new building at Fifth avenue and Forty-second street on May 23 last. This was Mr. Bigelow's last public appearance, and he overtaxed his strength on that occasion, bringing on a serious illness from which, to the astonishment of all, he made an apparently complete recovery.

For the last fifteen years of his life John Bigelow occupied a unique position in New York. His stand for the gold standard during Bryan's earlier campaigns, his return to the national Democratic platform in 1908, and his letter in favor of Hughes for governor in 1906, all carried great weight.

Bigelow's last years were spent chiefly in New York and at his country home at Highland Falls, with occasional European trips. The last of these was taken in the spring of 1911, when Bigelow was over ninety-three years old. His unmarried daughter, Miss Bigelow, was his most frequent companion. The other children are Major John Bigelow, Jr., who was wounded at the battle of San Juan: Poultney Bigelow, the writer; and Mrs. Annie Bigelow Harding, and Mrs. Grace Cook, married daughters.

REGULATION OF AERIAL NAVIGATION IN FRANCE.

Le Journal Officiel publishes the text of President Fallières' decree regulating aerial traffic. The provisions of the decree appear really in the form of a bill emanating from the Ministry of Public Works and Posts and Telegraphs. In view of the urgency and the delay which would necessarily arise in getting the measure through the two Chambers, M. Augagneur, Minister of Public Works, laid the matter before M. Fallières, who signed the decree, which is countersigned by the Ministers of the Interior, Finance, War, and Marine. The principal articles of the decree, it will be seen, are based upon the recommendations of the International Congress of Aerial Law and are as follows: No airship can be used in France without a permit of navigation, at least until it satisfies the conditions provided for by the international conventions. The demand for the permit must be accompanied by the necessary documents and addressed by the owner of the airship to the prefect of his place of residence. The certificate of navigability shall be granted by the department of mines after trials judged by that department to be sufficient. Upon demand, the prefect, having satisfied himself that all is regular, shall proceed to register the airship. No airship shall be allowed to circulate without carrying the letter F, if it be of French ownership, and the letters and numbers which are proper to it. At any time the department of mines can visit airships permitted to circulate in France, and withdraw in certain cases the certificate of circulation. The pilots of airships must possess a license. Airships are forbidden to circulate in agglomerations, save under certain conditions specified by the municipal authority. Save under special authorization, it is forbidden to airships to pass over zones indicated. Airships must descend when ordered so to do by signals to be subsequently decided upon. Without the authorization of the Minister of the Interior, the transport by airships of explosives, arms and munitions of war, and carrier pigeons is forbidden; also the transport and use of cameras and wireless apparatus. A log-book is to be kept. Representatives of public authorities are authorized to visit airships for fiscal and police purposes. The circulation of foreign military balloons is inter-

dicted in France. The decree carries with it a schedule of circulation, and therein are specified the colors and kinds of lights which it is obligatory to carry on airships from sundown to sunrise. Balloons, dirigibles, and spheriques must carry a horn, which the pilots must use in time of mist, fog, snow, or rain.

Cases of Interest.

KEEPING OF BOARDING HOUSE AS VIOLATION OF BUILDING RESTRICTION REQUIRING BUILDING TO BE USED EXCLUSIVELY AS RESIDENCE FOR PRIVATE FAMILY. — In Sayles *v.* Hall, (Mass.) 96 N. E. Rep. 712, it was held that a restriction in a deed limiting the buildings upon the premises conveyed to "a dwelling house to be used exclusively as a residence for a private family," was violated where the owner used a building upon the premises as a boarding house, the boarders and roomers averaging in number about twelve persons at any one time.

NOTE GIVEN BY PRISONER TO HIS ATTORNEY ON SUNDAY AS WORK OF CHARITY. — In Few *v.* Gunter, (Ga.) 72 S. E. Rep. 720, it was held that where a prisoner was in the common jail of the county under a warrant charging a bailable offense, and in order to be released from imprisonment he employed a lawyer to secure for him a bond and to represent him in the case, and the attorney did secure the bond and the prisoner was thereupon released, a note given by the prisoner to the lawyer for his services, including the service rendered in procuring the bond, was valid and collectible, although executed on Sunday, the consideration for the note being in the nature of a "work of charity" within the meaning of the Sunday laws of Georgia excepting from their operation work of charity.

WHERE SALE OF ADULTERATED FOOD TAKES PLACE. — In State *v.* Gruber it appeared that the defendant as traveling salesman for a New York manufacturer took an order from a dealer in St. Paul for certain confectionery, such order being subject to acceptance or rejection by the manufacturer. The order was accepted by packing the confectionery in boxes and delivering the same to a carrier in New York for shipment to the dealer in St. Paul. A portion of such confectionery was colored with coal-tar dye. It was held that the sale of the confectionery took place wholly in New York, and therefore the defendant in taking and forwarding the order was not guilty of selling adulterated confectionery in Minnesota within the meaning of a statute of that State prohibiting the manufacture or sale of confectionery colored with coal-tar dye.

VALIDITY OF RULE REQUIRING PASSENGERS WITHOUT TICKETS TO PAY MORE THAN REGULAR FARE. — In Allen *v.* Chicago, etc., R. Co., (Minn.) 133 N. W. Rep. 462, it was held that it was a reasonable regulation to require a passenger on a train without a ticket who tendered cash for transportation to pay ten cents more than the regular fare, the passenger being furnished with a receipt, which entitled him to a refundment of the ten cents. And it was further held that this rule was not in conflict with a State statute fixing the maximum rate of transportation of passengers at two cents per mile. As authority for the second holding the court cited Reese *v.* Penn. R. Co., 131 Pa. 422, wherein it was held that a similar rule was not a "charge for transportation" within the meaning of a provision in a railroad company's charter limiting such charges to a certain rate per mile. The Pennsylvania court said: "The essence of the meaning is that it is something required, exacted, or taken from the traveler as compensation for the service rendered, and, of course, something taken permanently — not taken temporarily, and returned. The purpose of the restriction in the charter is the regulation of the amount of fares, not of the mode of collection; the protection of the traveler from excessive demands, not interference with the time, place, or mode of payment. These are mere administrative details, which depend on varying circumstances, and are therefore left to the ordinary course of business management. We fail to see anything in the present regulation which can properly be treated as an excessive charge, within the prohibition of the charter."

RESPECTIVE DUTIES OF PERSONS PASSING OR SEEKING TO PASS EACH OTHER WITH VEHICLES. — In Hackett *v.* Alamito Sanitary Dairy Co., (Neb.) 133 N. W. Rep. 227, which was an action for damages for injuries sustained by the plaintiff while attempting to pass the defendant's servant on the street, the plaintiff being on a bicycle and the servant on a wagon, the court affirmed a judgment for the plaintiff rendered by the lower court and considered in its opinion the various authorities in England and the United States with respect to the rights of one attempting to pass another driving along a road or street in front of him. The court then said: "From a consideration of all these cases, it seems that no definite rule as to the respective duties of persons passing or seeking to pass each other with vehicles has been adopted by all courts. We are inclined, however, to adopt the rule, which seems to be based upon sound reasons, that it is ordinarily the duty of each party to keep the proper side of the road, but this is not absolute. He is not bound to keep his side, but if he does not he must use more care and keep a better lookout to avoid collision than would be necessary were he on the proper side. In a narrow street, he must not necessarily block the way, or crowd other travelers to one side, and he must use the highway in such a manner as not unreasonably to deprive other travelers of their equal right to the use of the street. In a busy city it is impossible to lay down a hard and fast rule, and whether negligence existed under the circumstances of the case is ordinarily a question for the jury."

STATUTE PROVIDING FOR TRIAL OF CAPITAL CASES BEFORE ONE INSTEAD OF TWO JUDGES AS EX POST FACTO LAW. — In Com. *v.* Phelps, (Mass.) 96 N. E. Rep. 349, it was held that a statute reducing the number of judges required to sit at the trial of capital cases from two to one without excepting from its operation and making special provision for cases where the killing took place before the statute was enacted was nevertheless constitutional and not *ex post facto* law. The court said: "In the case at bar there was no change in the indictment that had to be found nor in the conduct of the trial by which the fact of the defendant's guilt had to be established, nor in his right to have any and all questions of law reviewed by the same appellate court that was in existence when the alleged crime was committed. The only change was in the fact that one in place of two or more judges was to and did preside at the trial. The learned counsel for the defendant has frankly admitted that the only connection in which this change operated to the injury or prejudice of the defendant was in matters lying in the discretion of the presiding judge. His contention is that the fact that while before St. 1910, c. 555, § 3, matters lying in the discretion of the presiding judge were decided by two or more judges, at the trial they were decided by one judge only. But the reason why matters which are left to be finally decided in the discretion of the presiding judge are left to be so decided is because they are matters of such a character that whichever way they are decided it cannot be said that they are decided wrongly. We are of opinion that a change by which such matters are to be decided by one in place of by two or more judges is not a change which affects the substantial protection with which, at the time the offense was committed, the existing law surrounded the defendant as a person accused of crime."

WHAT CONSTITUTES ADMISSION TO THE BAR. — In *In re* Alexander, (Mich.) 133 N. W. Rep. 491, which was a petition by the State board of examiners to strike the name of one Alexander from the roll of attorneys, it appeared that, in April, 1907, respondent presented himself for examination before the State board of law examiners for admission to the bar of Michigan. As a preliminary to the taking of the legal examination, the board required certain evidences of general education, in default of which the applicant must pass an examination upon certain subjects. It was not disputed that respondent neither furnished the required evidence of his general educational qualifications, nor passed an examination thereon before taking the legal examination. It appeared, however, that he was permitted to take the legal examination upon the assurance that such proof would be later furnished to the board. Having successfully passed the legal examination, upon the request of respondent, he was permitted by the authority of one of the justices of this court to take the oath and sign the roll of attorneys in the clerk's office; his certificate of admission to be withheld until he had complied with the lawful requirements of the board. Respondent did furnish to the board a certificate from the Central High School of Detroit, showing that he had attended that institution between September, 1899, and November, 1903, and that through such attendance he had secured a total credit of sixty-three full hours. The board declined to accept this certificate as sufficient evidence of respondent's scholarship. In the meantime respondent had entered upon the practice of the law, and had assumed the rights and franchises pertaining to the office of an attorney at law. On these facts the petition was granted. The court said: "We must hold in the case at bar that the respondent never was admitted; that his taking the oath of office and signing the roll in the clerk's office, under the circumstances disclosed, did not constitute 'admission to the bar,' within the legal definition of that term. It follows that in assuming to enter upon the practice of the law respondent has usurped the rights and franchises of an office to which he can lay no legal claim. Respondent's name will be stricken from the rolls in accordance with the prayer of the petition."

WHEN INJUNCTION WILL LIE TO RESTRAIN PASSAGE OF INVALID ORDINANCE. — In Majestic Theatre Co. *v.* City of Cedar Rapids, (Ia.) 133 N. W. 117, the Iowa Supreme Court affirmed a judgment of the lower court refusing to enjoin a city council from passing a proposed ordinance prohibiting Sunday theatrical exhibitions. The suit was brought by theatrical proprietors, and the reason for seeking an injunction was that the proposed ordinance, if enacted, would be in violation of the State constitution, and therefore void. The court said: "A city or town, organized under the laws of the State, has a twofold character. It is not only endowed with certain purely legislative functions, by virtue of which it enacts police regulations and other general rules, by which the peace, good order, convenience, comfort, and prosperity of its inhabitants are sought to be conserved or promoted, but it is also charged with other powers, which are administrative rather than legislative, and still others more or less analogous to those of a private business corporation, by which it makes contracts, constructs improvements, and performs many acts which, directly or indirectly, affect personal and property rights. Where legislation of the first-mentioned kind is pending before the council, the court will not . . . interfere with its passage, or undertake to adjudicate its validity in advance of its passage. But, where the council, in the exercise of its administrative or business functions, undertakes *ultra vires*, or in violation of the city's contract obligations, the enactment of an ordinance by the very passage of which, as distinguished from its enforcement, irreparable injury will be done to the complaining party, interference by injunction with such proceedings is sometimes allowable. . . . The proposed ordinance in the present case is clearly in the nature of a police regulation. If it be passed, and is a valid exercise of municipal power, then it is the duty of the plaintiffs to obey it, even though its enforcement tends to reduce the profits of their business. If it be void for unreasonableness, or is not within the power delegated to the city, or because the statute conferring the authority is itself unconstitutional, as counsel argue, then the courts will not enforce it, and no one can suffer irreparable injury therefrom."

VALIDITY OF BEQUEST TO FEEBLE CONGREGATIONAL CHURCHES OF PARTICULAR STATE. — In French *v.* Lawrence, (N. H.) 81 Atl. Rep. 705, the court had to consider the question of the validity of a certain clause of a will which provided as follows: "At my said wife's decease, if any property is left after paying funeral expenses and liabilities, I desire the same to be divided into four equal parts . . . one-fourth to the feeble Congregational churches of New Hampshire." It was held that the clause was valid notwithstanding the contentions of the testator's heirs that it was invalid because it could not be administered without an exercise of prerogative power, because the will did not contemplate the appointment of a trustee, and because of uncertainty as to the churches intended to be benefited. The court said: "The mere statement of what is intended by prerogative power will demonstrate the fallacy of the defendants' first contention. It is the custom in England, when a bequest is given to charity, without specifying the particular purpose for which it is to be used, or when the purpose for which it is given is illegal, for the chancellor to designate a purpose for which the money shall be used. The chancellor, in doing this, is said to exercise prerogative power. The will designates the particular object Gideon [the testator] desired to promote, and his purpose is legal; consequently it will not be necessary to consider whether this court has jurisdiction of such causes. This is not to be construed, however, as an intimation that this court will not do whatever is necessary to effect the testator's intention, if it can be ascertained and is legal. Gideon knew that the bequest was not to take effect until after the death of his wife, and that it would be necessary for some one to determine which of the Congregational churches in this State were feeble and how the bequest should be divided among them. Since this is so, it must be assumed that he intended this work should be done by whomsoever the court appointed to complete the administration of his estate. The fact that the testator failed to name the particular churches which are to take the fund is relevant to the issue of the character of the trust, but not to that of its validity; that is, the fact that the testator failed to name the particular churches he wished to benefit makes it the duty of the State to see that it is divided among such churches as fairly come within the class the testator desired to benefit, but does not render the bequest invalid. This bequest, therefore, is valid."

VALIDITY OF STATUTE PUNISHING LIFE PRISONER COMMITTING ASSAULT ON ANOTHER WITH DEATH. — In Finley *v.* People, 32 U. S. Sup. Ct. Rep. 13, the court had under consideration the validity of a California statute (section 246 of the Penal Code) which provides as follows: "Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death." It appeared that the defendant was convicted under the statute in a California court and the death penalty imposed, and that on an affirmation of the sentence by the California Supreme

Court he prosecuted an appeal to the United States Supreme Court, urging that the statute was repugnant to the Fourteenth Amendment of the Constitution in that it denied to the defendant the equal protection of the laws, because it provided an exceptional punishment for life prisoners. The judgment of the California court was affirmed. The court through Mr. Justice McKenna said: "The Supreme Court [of California] sustained the law on the ground that there was a proper basis for classification between convicts serving life sentences in the State prison, as defendant was when he committed the crime for which he was indicted and found guilty, and convicts serving lesser terms. It is elementary that the contention is to be tested by considering whether there is a basis for the classification made by the statute. Applying that test, we see no error in the ruling. As said by Mr. Justice Henshaw, delivering the opinion of the court, 'The classification of the statute in question is not arbitrary, but is based upon valid reasons and distinctions.' And pointing out the distinction between life prisoners and other convicts, he said that 'the "life termers," as has been said, while within the prison walls, constitute a class by themselves — a class recognized as such by penologists the world over. Their situation is legally different. Their civic death is perpetual.' [153 Cal. 62, 94 Pac. Rep. 248.] Manifestly there could be no extension of the term of imprisonment as a punishment for crimes they might commit, and whatever other punishment should be imposed was for the legislature to determine. The power of classification which the lawmaking power possesses has been illustrated by many cases which need not be cited. They demonstrate that the legislature of California did not transcend its power in the enactment of section 246."

CONSTITUTIONALITY OF AMENDED SAFETY APPLIANCE ACT. — In Southern R. Co. *v.* United States, 32 U. S. Sup. Ct. Rep. 2, one of the questions involved was the constitutionality of the Safety Appliance Act of Congress passed in 1893 and amended in 1903. The original act required safety appliances on any car "used in moving interstate commerce," whereas the act as amended required safety appliances on "all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce." It was contended that the amended act was unconstitutional because it embraced vehicles used in moving intrastate commerce, provided such vehicles were used on a railroad engaged in interstate commerce. This contention was not sustained, however, the act being declared constitutional. The court, *per* Mr. Justice Van Devanter, said: "It must be held that the original act, as enlarged by the amendatory one, is intended to embrace all locomotives, cars, and similar vehicles used on any railroad which is a highway of interstate commerce. We come, then, to the question whether these acts are within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving interstate traffic, but embrace vehicles used in moving intrastate traffic. The answer to this question depends upon another, which is, Is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used in moving intrastate traffic, and the object which the acts obviously are designed to attain; namely, the safety of interstate commerce and of those who are employed in its movement? Or, stating it in another way, Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is so, not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce. Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car, and when this is not the case, the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen, and the like employees, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent; for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train, but to others. These practical considerations make it plain, as we think, that the questions before stated must be answered in the affirmative."

News of the Profession.

THE WEST VIRGINIA BAR ASSOCIATION will hold its next annual meeting at Grafton on July 17 and 18, 1912.

THE GEORGIA BAR ASSOCIATION will hold its annual convention in Savannah on May 30 and 31 and June 1, 1912.

THE NORTH CAROLINA BAR ASSOCIATION will hold its 1912 session on June 25–27, at a place to be decided on hereafter.

RESIGNATION OF MINNESOTA JUDGE. — Judge David F. Simpson has resigned from the bench of the Minnesota Supreme Court.

THE AMERICAN BAR ASSOCIATION has accepted the invitation of the Wisconsin Bar Association to hold its next annual meeting in Milwaukee the last week in August.

TEXAS JUDGE RESIGNS. — Judge Ben L. Jones of the Fifteenth District Court of Texas has sent his resignation to Governor Colquitt.

CANADIAN JUDGE RESIGNS. — The resignation is announced from Ottawa of Mr. Justice Pagnuelo of the Superior Court of the Province of Quebec.

PENNSYLVANIA BAR ASSOCIATION. — The executive committee of the Pennsylvania Bar Association has decided to hold the eighteenth annual meeting of the association at Cape May, N. J., on June 24–27, 1912.

CHANGES IN THE KENTUCKY COURT OF APPEALS. — Judge E. C. O'Rear of the Court of Appeals of Kentucky resigned in December, and Robert H. Winn, of Mt. Sterling, Ky., was appointed by the governor to succeed him.

SUPERIOR COURT APPOINTMENT. — Stephen C. Bragaw, of Washington, N. Car., has been appointed judge of the Superior Court of North Carolina to succeed Hon. George W. Ward, resigned.

KANSAS STATE BAR ASSOCIATION. — The twenty-ninth annual meeting of the Kansas State Bar Association was held at Topeka on Jan. 30 and 31. Further particulars will be given in the next issue of LAW NOTES.

APPOINTED JUDGE OF COUNTY COURT. — Former City Judge George A. Reeves, of Watertown, N. Y., has been appointed to fill the vacancy on the bench of the Jefferson County Court caused by the resignation of Judge E. C. Emerson.

THE ASSOCIATION OF JUDGES OF MICHIGAN held its nineteenth annual meeting in Lansing on Dec. 27 and 28, 1911. Warden Russell of the Marquette prison addressed the association on the operation of the indeterminate sentence law.

APPOINTED TO CIRCUIT BENCH. — Governor Harmon, of Ohio, has appointed Charles A. Niman, member of the law firm of Howland, Moffett & Niman, of Cleveland, a judge of the Circuit Court to succeed Judge Frederick A. Henry, resigned.

CHANGE IN GEORGIA COURT OF APPEALS. — Judge Arthur Powell has resigned from the bench of the Georgia Court of Appeals, his resignation taking effect on Jan. 16, 1912. Governor Slaton has appointed J. R. Pottle, of Blakely, to succeed Judge Powell.

NEW HAMPSHIRE ATTORNEY-GENERAL NOMINATED. — Hon. James Patterson Tuttle, of Manchester, has been nominated by the governor and council for the position of Attorney-General of New Hampshire, as successor to Hon. Edmund G. Eastman, of Exeter.

THE SOUTH DAKOTA BAR ASSOCIATION held its thirteenth annual session at Aberdeen on Jan. 4 and 5. The president's address was delivered by Norman T. Mason, of Deadwood, and the annual address by Judge Charles A. Willard, of Minneapolis, Minn. The latter's subject was "The Philippine Islands, Their Jurisprudence and Judicial System." Other addresses were made by E. T. Taubman, of Aberdeen, on "The Abolition of the County Court," and by A. H. Orves, of Yankton, on "Some Proposed Changes in Laws Relating to Taxes." The election of officers resulted as follows: President, James Brown, Chamberlain; first vice-president, J. H. McCoy, Aberdeen; second vice-president, Frank Anderson, Webster; secretary, J. H. Voorhees, Sioux Falls; treasurer, L. M. Simons, Belle Fourche. Executive Committee: First judicial district, A. H. Orves, Yankton; second circuit, A. J. Kieth, Sioux Falls; third, J. G. McFarland, Watertown; fourth, D. Haney, Mitchell; fifth, L. T. Van Slyke, Aberdeen; sixth, George Philips, Fort Pierre; seventh, L. N. Hedrick, Hot Springs; eighth, John T. Hefferman, Deadwood; ninth, A. Clay Darling, Mellette; tenth, E. B. Adams, Java; eleventh, Charles A. Davis, Fairfax; twelfth, A. E. Yeager, Lemmon.

APPOINTED MAGISTRATE AT WINNIPEG. — Hon. Hugh John Macdonald, K. C., ex-premier of Manitoba, and sometime minister of the interior in the Tupper government, has been appointed police magistrate of Winnipeg, succeeding the late Hon. T. Mayne Daly.

THE JUDICIAL CONFERENCE OF MISSOURI held its annual session at St. Louis on Dec. 29, 1911. In the election of officers Judge George D. Reynolds, presiding justice of the St. Louis Court of Appeals, was re-elected president of the conference. The other officers are: First vice-president, Judge James Ellison, of Kansas City; second vice-president, Judge Argus Cox, of Springfield; secretary, Judge Alonzo D. Burnes, of Platte City. The latter was re-elected.

THE NEBRASKA BAR ASSOCIATION met in annual session at Lincoln on Dec. 28 and 29, 1911. The president's address was delivered by B. F. Good. Other addresses were by Paul L. Martin, dean of the Creighton Law College, on "The Trained Lawyer," and by John H. Atwood, of Kansas City, on "The State as a Rate Maker."

A SESSION OF THE KENTUCKY CIRCUIT JUDGES' ASSOCIATION was held in Louisville on Dec. 28 and 29, 1911. The following officers were re-elected: Judge Thomas R. Gordon, Louisville, president; Judge William Reed, Paducah, vice-president; Judge William H. Field, Louisville, secretary; and Judge Samuel F. Kirby, Louisville, treasurer.

THE PROBATE JUDGES' ASSOCIATION OF OHIO held its annual banquet at Columbus on Jan. 9. Judge James V. Hynus, president of the association, acted as toastmaster. The speakers were Justice John A. Shauck of the Ohio Supreme Court; Presiding Judge Louis A. Winch of the Circuit Courts of Ohio; Judge William M. Rockel, of Springfield; and Judge Howard Ferris, of Cincinnati.

NEW APPELLATE COURT IN ILLINOIS. — The Illinois Supreme Court has appointed Judges Henry B. Freeman, Marcus Kavanagh, and Martin M. Gridley of the Superior Court of Cook county as judges of an additional branch of the Appellate Court of the first district. The appointment was made at the request of the judges of the Appellate Court and virtually establishes a new permanent branch of that court. The regular appellate judges are now nearly two and one-half years behind with their work, there being more than 1,600 cases on their docket.

JUSTICE HARLAN HONORED. — Memorial services were held on Dec. 16, 1911, in the United States Supreme Court chamber in memory of the late Associate Justice Harlan. Former Governor A. W. Wilson, of Kentucky, presided, eulogizing the personal characteristics of the eminent jurist. Solicitor-General Lehmann, as chairman of a committee on resolutions, said Justice Harlan participated in the consideration of more cases than any other man that ever sat on the Supreme Court bench. He said Justice Harlan rendered the opinion of the court in 700 cases during his thirty-three years on the bench, besides giving many dissenting opinions. Senators Bailey, Root, and Bradley were also speakers. Hannis Taylor and Blackburn Esterline praised the jurist from the standpoint of the lawyer in practice before Justice Harlan.

THE ONTARIO BAR ASSOCIATION held its annual meeting in Toronto on Dec. 27 and 28, 1911. Addresses were delivered by B. F. Johnston, K. C., honorary president; W. R. Willcox, chairman of the civil service commission of New York; Col. J. E. Farwell, K. C.; Auguste Lemieux, K. C., of Montreal, and F. W. Wegenast. The list of officers elected was as follows: Honorary president, B. F. B. Johnston, K. C.; president, W. C. Mikel, K. C.; vice-presidents, M. H. Ludwig, K. C., F. M. Field, K. C., W. J. McWhinney, K. C.; recording secretary, George C. Campbell; corresponding secretary, R. J. Maclennan; treasurer, A. McLean Macdonnell, K. C.; historian, Col. W. N. Ponton; councillors, A. K. Clarke, K. C., F. E. Hodgins, K. C., S. F. Lazier, K. C., Charles Elliott, J. E. Farewell, K. C., A. Lemieux, Walter Mills, F. W. Harcourt, K. C., Frank Denton, K. C., James Bain, K. C., C. A. Moss, and C. F. Ritchie.

PHI DELTA PHI CONVENTION. — The thirteenth national convention of the legal fraternity of Phi Delta Phi was held at Cincinnati on Dec. 27 and 28, 1911. Delegates were in attendance from forty-three active chapters, established in as many law schools in the United States and Canada. Petitions were considered from six law schools in which there are no chapters at present, and charters were granted to petitioners from the University of North Dakota, the University of South Dakota, the University of Oklahoma, and Tulane University, where chapters will be installed in the near future. The following general officers were re-elected: President, Earl G. Rice, Seattle,

Wash.; secretary-treasurer, Emmett A. Donnelly, Milwaukee, Wis.; cataloguer, Geo. A. Hatzenberger, Greenville, Ohio. Phi Delta Phi is the oldest and largest graduate fraternity among law students, having been established at the University of Michigan by Thomas M. Cooley in 1869. A quarterly magazine known as *The Brief* is maintained by the fraternity and edited by Albert B. Chandler, of St. Louis, Mo.

DEATH OF ELBERT E. FARMAN. — Elbert E. Farman, former judge and at one time consul-general at Cairo, Egypt, died on Dec. 31, 1911, at his home in Warsaw, N. Y., aged eighty-one years. He was graduate of Amherst College, class of '53. In March, 1876, President Grant appointed him consul-general to Cairo, and this position he held until July, 1881. He obtained the granite obelisk known as Cleopatra's Needle, which stood for centuries in front of the Temple of Cæsar in Alexandria, and now stands in Central Park, New York. In July, 1881, Mr. Farman was appointed judge of the mixed tribunals of Egypt in place of Philip H. Morgan. In 1883 he was designated by President Arthur a member of the international commission to fix the indemnity to be paid to the people of Alexandria for damages resulting from the riots, bombarding, and pillage of the city in June and July, 1882. While in Egypt Judge Farman made interesting collections, among them the Farman loan collection, now at the Metropolitan Museum in New York city. The khedive of Egypt made him a grand officer of the Imperial Order of the Medjidieh. Judge Farman was the author of two works, "Along the Nile with General Grant," and "Egypt and Its Betrayal."

THE MASSACHUSETTS BAR ASSOCIATION held its annual meeting at Boston on Dec. 28, 1911. The topic for discussion was the Workingman's Compensation Act passed by the last legislature, a paper being read by P. Tecumseh Sherman, of New York. Provision was made for the painting of portraits of the two living ex-chief justices of the State Supreme Court — Oliver Wendell Holmes and Marcus P. Knowlton — the portrait of the former to be placed in Boston and that of the latter in Springfield. In the evening a banquet was given in honor of Chief Justice Arthur P. Rugg of the Supreme Court. In addition to the chief justice the speakers included Governor Foss, ex-Governor John D. Long, Attorney-General James M. Swift, former Attorney-General Herbert Parker, Judge Hale of the United States District Court of Maine, Judge Richard W. Irwin of Northampton, Charles W. Clifford and Alfred Hemenway. The election of officers resulted as follows: President, Charles W. Clifford, of New Bedford; vice-presidents, William H. Brooks of Springfield, James E. Colter, James B. Dunbar, Samuel K. Hamilton, John C. Hammond, and Herbert Parker; secretary, Robert Homans; treasurer, Charles E. Ware; executive committee, Hollis R. Bailey, Henry H. Baker, Paul R. Blackmur, Loyed E. Chamberlain, Robert G. Dodge, William H. Dunbar, Lee M. Friedman, T. Hovey Gage, Frederick L. Greene, Charles E. Hibbard, Henry F. Hurlburt, Andrew J. Jennings, Robert A. Knight, John W. Mason, William H. Niles, James M. Swift, George S. Taft, James H. Vahey, Joseph B. Warner, Alden P. White, Frederick N. Wier. The meeting of the association was adjourned to Jan. 12, 1912.

OKLAHOMA STATE BAR ASSOCIATION. — The annual meeting of the Oklahoma State Bar Association was held in Oklahoma City on Dec. 21 and 22, 1911. The president's address was delivered by John H. Burford, of Guthrie, and the annual address by Hon. Frederick L. Siddons, of Washington, D. C., the latter's subject being "The Lawyer and Democracy." Papers were also read as follows: By J. W. Hocker, of Purcell, on "Workingmen's Compensation Acts;" by P. C. Simons, of Enid, on "Powers and Jurisdiction of Special Judges;" by John H. Kane, of Bartlesville, on "Questions in Indian Titles;" by Justice Robert L. Williams, of Durant, on "The Judicial History of Oklahoma;" by J. B. Campbell, of Muskogee, on "Dawes Commission Records;" and by Judge C. B. Stuart, of Oklahoma City, on "The Recall of Judges." United States Senator Robert L. Owen also spoke on the recall of judges. A total of 103 new members were taken into the association. The complete list of officers elected for the ensuing year is as follows: President, J. W. Hocker, Purcell; secretary, C. O. Bunn, Oklahoma City; treasurer, C. H. Ennis, Shawnee. General council, C. A. Galbraith, Ada; R. F. Blair, Wagoner; Allen Wright, McAlester; E. E. Blake, El Reno; John T. Hayes, Hobart; Sam H. Sullivan, Newkirk; J. H. Grant, Oklahoma City. Executive committee, Messrs. Hocker, Bunn, Ennis and Burford, *ex officio;* J. C. Stone, Muskogee; J. D. Carmichael, Chickasha, and James R. Tolbert, Hobart. District vice-presidents, first, Houston B. Teehee, Tahlequah; second, E. B. Lawson, Nowata; third, N. A. Gibson, Muskogee; fourth, J. H. Gordan, McAlester; fifth, Philo S. Jones, Wilburton; sixth, V. B. Hayes, Durant; seventh, T. D. McKeown, Ada; eighth, E. A. Walker, Ardmore; ninth, W. A. Huser, Okemah; tenth, J. H. Wahl, Shawnee; eleventh, Frank B. Burford, Guthrie; twelfth, Lester A. Maris, Ponca City; thirteenth, Thomas G. Chambers, Oklahoma City; fourteenth, Ben F. Williams, Norman; fifteenth, Guy Green, Ryan; seventeenth, H. N. Boardman, Watonga; eighteenth, G. A. Brown, Mangum; nineteenth, S. J. Viggs, Alva; twentieth, George L. Bowman, Kingfisher; twenty-first, A. J. Biddison, Tulsa; twenty-second, William M. Matthews, Okmulgee; twenty-third, W. H. Kornegay, Vinita; twenty-fourth, J. H. Kane, Bartlesville; twenty-fifth, John D. Rogers, Altus; twenty-sixth, G. A. Foshee, Coalgate.

DEATHS. — In addition to those mentioned above, the following deaths in the profession have occurred since our last issue: Ex-Judge Allen C. Adsit, Grand Rapids, Mich.; Charles D. Ainger, Andover, Ohio; John F. Anderson, Monticello, N. Y.; Judge J. M. Anderson, Hutchinson, Kan.; Charles S. Beattie, Chicago, Ill.; Asa R. Brundagee, Wilkesbarre, Pa.; Joseph A. Bryan, San Francisco, Cal.; George C. Buel, Pittsburg, Pa.; Robert Candee, Chicago, Ill.; Roswell P. Clement, San Francisco, Cal.; C. C. Davison, Rochester, N. Y.; C. H. Deans, West Medway, Mass.; Dudley A. Dorr, Boston, Mass.; G. Tod Ford, Akron, Ohio; J. C. Frampton, Newark, Ohio; Fred Gottschalk, St. Louis, Mo.; Col. W. R. Holloway, Indianapolis, Ind.; Edward P. Hotchkiss, Milwaukee, Wis.; Col. James Henry Jones, Woodville, Miss.; Aaron Kahn, New York city; George A. Knight, Brazil, Ind.; Clemens J. Kracht, Yonkers, N. Y.; Rush Lake, Pittsburg, Pa.; Thomas Leaming, Philadelphia, Pa.; Alfred R. Lightfoot, New York city; Charles H. Marple, Beardstown, Ill.; Judge C. S. Martin, Statesboro, Ga.; Major John B. Mhoon, Pasadena, Cal.; Howard H. Morse, New York city; Bernard D. Murphy, San Francisco, Cal.; Clyde D. Nevin, Kansas City, Mo.; Edward R. Olin, Brooklyn, N. Y.; Ben Posey, Murphy, N. Car.; E. Lloyd Posey, New Orleans, La.; Senator Edward J. Rainey, Chicago, Ill.; Judge Silas H. Reid, St. Louis, Mo.; Edward S. Robert, St. Louis, Mo.; Judge Charles W. Ross, Biddeford, Me.; Thomas F. Shepard, Bay City, Mich.; George H. Stein, St. Louis, Mo.; Senator Greenwood A. Taylor, Hodgenville, Ky.; Seth M. Tucker, Wichita, Kan.; Albert W. Webb, Dallas, Texas; Elmer S. White, Brooklyn, N. Y.; S. F. Williford, Harrisburg, Ill.

"EVERY important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy." Holmes, The Common Law, Lecture I. (p. 35).

English Notes.

A JUROR'S EXCUSE. — A juror gave a novel reason to the Lord Chief Justice of Ireland to be excused from serving at the Munster winter assizes. "My lord," he said, "I am six feet six inches high, and I find it most distressing to sit on the low benches in the jury box, and, besides, I am suffering a little from rheumatism." His lordship said he would excuse him on the grounds of the rheumatism, "more particularly," added the chief justice, "because at this moment I am suffering so terribly from the same malady that I doubt if I will be able to get through the business of these assizes."

INCREASE OF PERJURY. — His Honor Judge Edge, in giving his decision recently in a case tried before him in Clerkenwell County Court said: "The increase of perjury in the County Courts is so alarming that public attention ought to be directed to it. It is a pressing demand. I am saying it as a retiring judge, after being on the bench for twenty-three years, that it is almost impossible to do justice between parties owing to the prevalence of false swearing. It really is shocking. It has been a matter which has placed a very great anxiety upon judges who have to try cases, and endeavor to do what is right and just between parties. False swearing is increasing in a way that I think the legislature ought to pay attention to at once. I do not think any one would oppose that great powers should be placed in the hands of judges for checking perjury."

MARRIAGE LAWS OF FOREIGN COUNTRIES. — A Blue Book [Cd. 5993] has been issued giving the latest information to be obtained about the marriage laws of foreign countries. Wherever possible a translation of the actual text of the law is given; and all the summaries and other additional matter have been either supplied by the authorities of the country concerned or based on information supplied by those authorities. An introductory note explains that the principal object of this publication is to enable British subjects desiring to contract marriage in one of the countries mentioned therein, or to marry a foreigner in any country, to take such precautions as they may desire (*a*) to insure that their marriage will be valid in all countries in which it is to their interest that it should be valid; (*b*) to avoid committing a breach of the law of the foreign country in which their marriage is to take place.

LARCENY OR FALSE PRETENSES. — Upon an indictment for the larceny of certain articles of jewelry and a sum of money, the question was raised at the London Sessions in December last of the distinction between larceny and false pretenses. The evidence for the prosecution showed that the prisoner had introduced to another person a foreigner who sold to the latter the jewelry in question. The alleged purchaser, in the presence of the prisoner, gave in payment a false note for £50, which the foreigner, who was not familiar with Bank of England notes, understood to be genuine. Both the alleged purchaser and the prisoner received a portion of the balance of cash which the foreigner paid over as being the change due for the difference between the £50 and the price of the jewelry. The chairman directed the jury to return a verdict of not guilty, as the offense disclosed was that of obtaining the jewelry and money by false pretenses and was not larceny, inasmuch as the foreigner had parted with the property in the jewelry and money of his own free will. The distinction between the two crimes is set forth in Archbold's Criminal Pleadings (24th ed., p. 528) as follows: "In larceny, the owner of the thing stolen has no intention to part with his property in the money or chattel, but it is obtained from him by fraud." The Larceny Act of 1861, § 88, provides that if upon an indictment for false pretenses it is proved that the accused obtained the property in such a manner as to amount in law to larceny, he shall not on that account be acquitted. The converse case is, however, not provided for; hence it is advisable in cases of doubt that the indictment should be for false pretenses. This course would doubtless be taken more frequently if it were not for the fact that the provisions of the Vexatious Indictments Act, 1859, apply to prosecutions for false pretenses.

ASSAULTS IN COURT. — Mr. Justice Ridley had a narrow escape from serious injury at the Birmingham Assizes on Dec. 8, 1911. A prisoner, who was being tried for breaking into a dwelling house, threw at the bench a stool, which rebounded and hit his lordship on the forehead. Fortunately, his lordship was not seriously injured. The incident will recall recollection to the fact that by the ancient common law before the Conquest, according to Blackstone, striking in the King's courts of justice was a capital felony. "Our modern law," he quaintly observes, "retains so much of the ancient severity as only to exchange the loss of life for the loss of the offending limb. Therefore, a stroke or blow in the Superior Courts or Courts of Assize or Oyer and Terminer, whether blood be drawn or not, or assaulting a judge sitting in the court by drawing a weapon, is punishable with the loss of the right hand and imprisonment for life." (Stephen's Blackstone, iv., pp. 310–311.) In 1798 Lord Thanet and others were prosecuted by an information filed by the attorney-general for a riot at the trial of Arthur O'Connor and others for high treason under a special commission at Maidstone. Two of the defendants were found guilty generally. The first three counts charged (*inter alia*) that the defendants did riotously make an assault on one J. R., and did then and there beat, bruise, wound, and ill-treat the said J. R. in the presence of the commissioners. When the defendants were brought up for judgment, Lord Kenyon expressed doubts whether upon this information the court was not bound to pronounce the judgment of amputation of the right hand, etc., as required in a prosecution expressly for striking in a court of justice. In consequence of these doubts the attorney-general entered *nolle prosequi* upon the first three counts, and the court pronounced judgment of fine and imprisonment as for a common riot. Two years ago the Right Hon. Mr. Justice Gibson, sitting at the assizes in Cork, in a case in which a blow was inflicted in the presence of the court, in reprobating the offense, enlarged on its heinous character, and mentioned that the common law, by which amputation of the right hand was the punishment awarded in such a case, had not been modified by statute.

TITLE OF OCCUPANT OF THRONE. — The style, title, and dignity of King-Emperor applied to His Majesty the King in relation to the great state ceremonial in India, in which the sovereign has been the centre of attraction, will recall to recollection the variations from time to time in the title of the occupant of the throne. The position of the crown as an imperial crown has been well established. In the reign of Henry VIII. by two successive statutes the crown was declared to be an imperial crown. This doctrine was reiterated at the accession of James I., and was again reiterated at the time of the union of Great Britain and Ireland. The title, however, of the sovereign has changed. In 1541 Ireland was raised from a lordship to a kingdom, and the King of England and France, as the sovereign of this country then and for many a generation afterwards styled himself, became King of England, France, and Ireland. When James VI. of Scotland became King of England his title was King of England, Scotland, France, and Ireland. At the union with Scotland and sovereign became King of Great Britain, France, and Ireland. At the union with Ireland he became King of the United Kingdom of Great Britain and Ireland, while the title of King of France was, more than three

centuries after it had ceased to have a semblance of reality, abandoned. In 1876, by virtue of the Royal Titles Act of that year, the sovereign by proclamation is also styled Emperor of India. This title, however, as a general rule, is only to be used in India, while by the Royal Titles Act of 1901 the sovereign is styled "King of all the British dominions beyond the seas." In the Acts of 1876 and of 1901 the words of the new title in the clauses of these statutes which make legal a change in the style and title of the sovereign were not embodied — a course which was adopted in the precedent of the Act of Union with Ireland in its provisions in relation to a change in the style and dignity of the monarch. The title "Defender of the Faith," which is jealously retained by the sovereigns of this country in accordance with public sentiment, was originally conferred on Henry VIII. by Pope Leo X., and, after his severance from Rome, was retained by him by virtue of an Act of Parliament. The title of Defender of the Faith is still so dearly prized by a Protestant people that the florin of 1849 had to be recoined because the letters "F. D." were omitted in the legend.

INTERROGATORIES TO PROVE SCIENTER BY OWNER OF DOG. — Condensed into the crude, but none the less expressive, maxim, "Every dog is entitled to his first bite," is the somewhat callous rule of law that no liability attaches to the owner of a dog to any one who may have been bitten thereby unless the animal's ferocious disposition to attack and bite hmuan kind is established to the satisfaction of the court. The reason for this is plain enough, as is, of course, known to everybody: Before the owner can be held accountable in damages to a person who complains of having been bitten, the onus lies on the latter to prove that the owner knew full well that he kept a savage animal unsafe to be at large. In other words, the allegation of *scienter*, or knowledge of the vicious propensities of the dog, which is imputed to the owner, must be supported by evidence called for the plaintiff that the owner was aware that some person had been bitten before the plaintiff. (See hereon Osborn *v.* Chocqueel, 74 L. T. Rep. 786, [1896] 2 Q. B. 109.) But essential as it may be to the defendant to be informed as to who has been previously bitten, he may not, according to the recent decision of the Court of Appeal in Knapp *v.* Harvey (105 L. T. Rep. 473), administer interrogatories to the plaintiff solely for the purpose of ascertaining the name. For, as appears from the report of that case, the plaintiff there having given particulars of the specific occasions on which the defendant's dog had bitten certain men, an attempt to learn who those individuals were was frustrated by the decision of the Court of Appeal, on the ground that a party could not be allowed to ask the names of his opponent's witnesses. In the leading case of Marriott *v.* Chamberlain (54 L. T. Rep. 714, 17 Q. B. Div. 154, at p. 163), it was laid down by Lord Esher, M. R., that the right to interrogate was not confined to the facts directly in issue, but extended to any facts the existence or nonexistence of which was relevant to the existence of the facts directly in issue. That principle was lately applied in a very forcible manner in Nash *v.* Layton (104 L. T. Rep. 834, [1911] 2 Ch. 71). The identity of the persons alleged to have been anteriorly bitten by the defendant's dog in Knapp *v.* Harvey (*ubi sup.*) being a substantial part of the facts material to his case, he relied on Marriott *v.* Chamberlain (*ubi sup.*). But, as was remarked by Lord Justice Buckley, the identity of the person bitten was not in issue. And seeing that the defendant was, in effect, striving to discover what would form part of the plaintiff's evidence, the interrogatories were very properly held to be inadmissible.

FORGERY IN FIRM NAME. — On the 19th of December last an important decision was given upon an appeal from a conviction upon an indictment under section 24 of the Forgery Act 1861. That section enacts that "whosoever, with intent to defraud, shall draw, make, sign, accept, or indorse any bill of exchange or promissory note . . . by procuration or otherwise, for, in the name, or on account of any other person without lawful authority or excuse . . . shall be guilty of felony. . . ." The evidence showed that the appellant had accepted a bill of exchange in the name of a firm of which he was a partner, for the purpose of negotiating the bill for his own benefit. The jury found that he had no authority in fact, that he had no honest belief that he had authority so to accept the bill, and that his intention was to defraud. It was contended that no offense had been committed within the above-quoted section on the ground that a firm was not a "person" within the meaning thereof, as it had no personality in law in the same manner as an individual or a corporation has. Further, it was argued that, even if the firm designation could be held to be the name of a person within the section, the appellant had not accepted the bill of exchange in the name of "another" person, as he had the right to use the firm name by virtue of his being a partner, and that therefore in using it he was not making a false document. It was also suggested that the section only applied to the case of a bill of exchange or other document signed "by procuration or otherwise for, in the name, or on account of any other person," and that it was passed in order to reverse the decision in Reg. *v.* White, 2 Cox C. C. 210. That case decided that no forgery was committed where the accused had indorsed a bill of exchange "per procuration, Thomas Tomlinson, Emanuel White," for the purpose of fraudulently discounting it. The Court of Criminal Appeal overruled all these objections and dismissed the appeal, holding that there was an acceptance in the name of another "person" within the meaning of the section, and that, if they were to hold that the firm name was merely a firm designation within section 4 of the Partnership Act 1890, they would be nullifying the intention of the legislature. The court pointed out that the intention of the appellant was to make his partner liable upon the bill, whilst he received the proceeds of its negotiation; and that he could not set up that at law or by statute his authority as a partner to bind the firm by signing a bill of exchange would authorize him to do this.

RESTRAINING PROCEEDINGS IN FOREIGN COURT. — A question of much importance, but, strange to say, singularly bare of modern authority, came before the Court of Appeal in the recent case of Pena Copper Mines Limited *v.* Rio Tinto Company Limited on appeal from a decision of Mr. Justice Swinfen Eady. The learned judge in the court below had granted an injunction to restrain one of the parties to a contract made in England and in accordance with the law thereof from continuing or prosecuting (except under or in pursuance of an award made under the contract) certain proceedings commenced by them against the other party in Spain. This gave rise to the question whether it was within the jurisdiction of the court to grant an injunction to restrain the prosecution of proceedings commenced in a foreign court. And it was contended that there was no case in which it had been done in order to enforce an arbitration clause. But the learned judges of the Court of Appeal came unanimously to the conclusion that the court had a discretionary jurisdiction so to do, if the bringing of those proceedings was in breach of a contract entered into in England. The decision of the House of Lords in Hamlyn and Co. *v.* Talisker Disillery Company (71 L. R. Rep. 1, [1894] A. C. 202, at p. 211) was relied upon by the appellants' counsel as being an authority in their favor, having regard to what was said by Lord Watson in that case. But the Court of Appeal negatived the notion that anything there could be treated as of assistance to the appellants. In that case, it was laid down by Lord Herschell, L. C., that where a contract is entered into between persons residing in different countries under different systems of law, it is a

qustion in each case according to what law it was the intention of the parties that their rights, either under the whole or any part of the contract, should be determined. Seemingly, therefore, the jurisdiction of any court might be extended by agreement between the parties to a contract. That such was the effect of the decision there was the view expressed by the Court of Appeal in the present case. Although perhaps not an authority exactly covering the question raised in the present case, it was apparently the only logical consequence of the decision of the House of Lords that proceedings commenced in a foreign court could be restrained if brought in breach of a contract entered into in England and in accordance with the law of England. And as having that beneficial result it was regarded by the Court of Appeal. Reference to the two old authorities cited by Lord Justice Farwell of Carron Iron Company *v.* MacLaren (5 H. of L. Cas. 416) and Lord Portarlington *v.* Soulby (3 My. & K. 104) fortifies the conclusion thus arrived at.

STATEMENT BY DECEASED WORKMAN. — "The wasp's sting case" is what Amys *v.* Barton (131 L. T. Jour. 577) will probably be colloquially styled in the courts when workmen's compensation cases come before them. For the death of the workman there resulted apparently from an injury of that nature; and for the first time compensation was then claimed in respect to such an injury. The case dealt with the interesting question whether that was an accident arising "out of" the employment of the deceased as well as "in the course of" it, within the meaning of section 1 of the Workmen's Compensation Act 1906 (6 Edw. VII., c. 58); and the answer was in the negative, having regard to the circumstances of the case. The importance, however, of the case really depends on a point of far wider application: Was evidence of a communication as to the immediate cause of his illness, which the workman had made to his doctor prior to his decease, admissible in evidence, or had it to be excluded on the ground that it was mere hearsay! His Honor Judge Mulligan, relying on what he conceived was the result of the decision in the Irish case of Wright *v.* Kerrigan (1911, 2 Ir. L. Rep. 301; 45 Ir. L. T. Rep. 82), came to the conclusion that the statement so made by the workman ought to be admitted. But although the learned judge had had cited to him the decision of the Court of Appeal of England in Gilbey *v.* Great Western Railway Company (102 L. T. Rep. 202) — and, indeed, had applied it in regard to the proposed evidence of certain other witnesses — he did not seemingly attach the weight that he should have done to what was enunciated in that case. In short, the learned judge failed to appreciate the far-reaching nature of the decision there, being influenced by what he presumed was intended to be laid down in the Irish case. But reference to the report of Gilbey *v.* Great Western Railway Company (*ubi sup.*) shows that statements alleged to have been made by an injured workman shortly before his death are not admissible as evidence of the occasion and cause of the injury from which the workman suffered. Although, as was there remarked by Lord Justice Fletcher Moulton, the court in workmen's compensation cases is accustomed to give considerable latitude to parties in admitting the statements of deceased persons under the head of what is called *res gestæ*, yet it does not go to the extent of permitting such statements to be admitted as evidence of the facts deposed to. As to the Irish case of Wright *v.* Kerrigan (*ubi sup.*), the Court of Appeal did not consider that it was inconsistent with their own decision in Gilbey's case (*ubi sup.*). But however that may be, the latter is binding, and the former is not, on County Court judges in England as well as on the Court of Appeal.

REMOVAL OF JUDGES BY PARLIAMENT. — The importance to the interests of the commonwealth of preserving the independence of the judges precludes either house, in deference to the principles of constitutional morality — although Parliament is limited by no restraints in this sphere of its power, except such as may be self-imposed — from entertaining an application against a judge, unless such grave misconduct were imputed to him as would warrant, or rather compel, the concurrence of both houses in an address to the Crown for his removal from the bench. The first case wherein the interposition of Parliament was invoked for the removal of a judge under the provisions of the Act of Settlement occurred in 1805, in reference to Mr. Justice Fox, of the Irish Bench. After a protracted investigation, the prosecution was abandoned on the ground that the proceedings, which had originated in the House of Lords, should have been commenced in the House of Commons, since, according to ancient constitutional principle, the lords are judges and the commons are the grand inquest of the nation. In 1821 Chief Baron O'Grady, of the Irish Court of Exchequer, was accused by the commissioners on the courts of justice in Ireland in their reports of having unjustly and arbitrarily increased his own fees. The charge was investigated and confirmed by two select committees of the House of Commons, whose reports were referred to a committee of the whole House, which resolved that, as the receipt of fees by judges had been recently abolished by law, it did not seem necessary under all the circumstances, although amendments exculpating the chief baron had been defeated, to adopt any further proceedings in the case. On the 13th February, 1834, Mr. Daniel O'Connell brought before the House of Commons a complaint against Sir William Smith, one of the barons of the Court of Exchequer, for neglect of duty and introducing political topics into his charges, and succeeded in carrying a motion for the appointment of a select committee to inquire into the conduct of the judge. A few days afterwards, on the 21st February, 1834, it was represented to the House that a *prima facie* case sufficient to justify the removal of Mr. Baron Smith from the bench by a proceeding under the statute had not been made out, and that Parliament had no constitutional right to institute an inquiry into the conduct of a judge with any other view than that of addressing the Crown under the provisions of the statute for his removal, "else would the independence of the judicial bench be a mockery." It was accordingly moved that the order for the appointment of a committee be discharged, and the motion was carried by the speech of Sir F. Shaw. The case of Mr. Baron Smith has been adopted as a precedent, and has been followed in the cases of Lord Abinger, when Lord Chief Baron, in 1843; Sir Fitzroy Kelly, when Lord Chief Baron, in 1867; Mr. Justice Keogh in 1872, and Mr. Justice Grantham in 1906. There is only one instance in which an address for the removal of a judge received the sanction of both houses and the compliance of the Crown — that of Sir Jonah Barrington, judge of the High Court of Justice in Ireland, who was in 1833 removed from the bench by this method, owing to his malversation of funds in his court. Lord Brougham, by a curious lapse of memory, forgot the case of Sir Jonah Barrington although it was an incident in the period in which he himself was very actively interested in "affairs." "The great principle of the judges' independence is," he writes in 1863, "well observed in the English system. All the judges, with the exception of the lord chancellor, hold their offices for life, and are only removable by a joint address of the two houses of Parliament, to which the sovereign must assent, and there is no instance of this ever having been done."

"WHEN a judge sums up to a jury he must not be taken to be inditing a treatise on the law." *Per* Darling, J., in Rex *v.* Meade, [1909] 1 K. B. 895, 898, *quoted* in Rex *v.* Blythe, 19 Ontario Law Rep. 393.

Obiter Dicta.

A DUMB CLASS. — Speaking of a certain statute, Joyce, J., said in West *v.* Gwynne, [1911] 2 Ch. 1: "The section with which we have to deal in this case is quite plain to every one but a lawyer."

A VERNAL CASE. — In the case reported in 31 Sup. Ct. Rep. 136, the attorneys for the plaintiff in error were May, Flowers & Whitfield. The name of the defendant in error was Turnipseed.

NOR ON ANY OTHER DAY. — In Chesapeake, etc., R. Co. *v.* Austin, 137 Ky. 611, the court, speaking of the conductor of a railroad train, said: "On a hot day, with a big crowd to manage, he was not required to look amiable."

THE OLD, OLD STORY. — "This is another case where liquor, cards and a sixshooter have furnished a subject for the coroner and a victim for the penitentiary." *Per* Ailshie, J., in State *v.* Lockhart, 18 Idaho 730.

NOT AS BAD AS GENERALLY REPRESENTED. — "There is nothing about the practice of the profession of the law which makes the business dangerous to the public. It does not threaten the public health or safety, nor is it demoralizing to the public." Sonora *v.* Curtin, 137 Cal. 585.

WHAT WOULD A FRENCH JUDGE SAY? — "While the humble, but useful, potato could hardly be classed as a fruit by even the most Hibernian of judges, yet we may go so far as to take notice that it is a vegetable that, like all things earthly, is subject to decay." *Per* McBride, J., in James Higgins Co. *v.* Torvick, (Ore.) 106 Pac. Rep. 23.

Q. E. D. — "In law as in mathematics the multiplication of 0 by 2 does not make 1. In other words, a piece of evidence, which in and of itself is incompetent under settled rules of law, cannot be rendered admissible by attempting to link it up with some other fact or circumstance that might be competent. Otherwise, it is made possible to augment 1 by the mathematical absurdity of attempting to add to it 0." *Per* Philips, D. J., in Sorensen *v.* United States, 168 Fed. 785.

THREE KINDS OF HANDWRITING. — Most remarkable among execrable writers have been John Bell, the barrister of whom Lord Eldon said to the Prince Regent that he was the ablest equity lawyer of his time, though he could "neither read, write, walk nor talk." Bell was a cripple, and his Westmoreland accent combined with his stammer to make his speech unintelligible. The character of his writing appears from his own statement that he had three styles, one of which he could read but his clerk could not, while the second was intelligible to his clerk but not to himself, and the third baffled both of them. — *London Chronicle.*

ONE OF THE PEERS. — A carpenter named David Cohn was recently under examination for jury duty in a murder case in New York city. Cohn had been grilled pretty badly by Bartow S. Weeks, counsel for the defense, in regard to his understanding of the terms "premeditated and deliberate" as applied to motive for murder.

"You say you understand what these terms mean," said Mr. Weeks. Cohn nodded.

"Do you understand that they refer to a weapon?"

"It is a kind of a weapon, I should say," asserted Cohn, cautiously.

Mr. Weeks tried to conceal a smile as he submitted his right to excuse the talesman. The records of the court showed that Cohn was foreman of a jury that brought in a verdict of acquittal in another murder case a week or so ago.

CAUTION. — "I'm afraid my profession is not in very good repute," said a lawyer to his wife on his return from his vacation. His wife asked him why he thought so. "You may remember," he continued, "that I wrote a lot about old Joe Smith and how much I liked him?" "Yes," said the wife. "Well, I thought the old chap returned the compliment, but his friendliness was tempered with caution, as I found out. It happened that I was able to straighten out a legal tangle that he had got involved in, and when he asked for his bill I was very glad to say that, out of friendship, I wouldn't charge him anything. He seemed greatly pleased, and thanked me cordially. Then he said, 'Would you mind giving me a receipt?'"

AN EMBRYO DANIEL WEBSTER. — The clerk of the Supreme Court of Texas has been unable to resist the temptation, he says, to send us a copy of a letter recently received by him from a correspondent in Commerce, Texas, "one evidently contemplating the study of law." The letter is as follows, *in hæc verba,* punctuation and all:

"Commerce
Tex
12/1 1911
to the clurk of the supream corte Houston texas
Dear Sur Please send me the Printed Rules an Sub Jects of the Rules of admitance to the bar For the Practicias of law and oblige youres.
_____."

MORE MINORITY OPINIONS. — The paragraph in our December number, entitled "Much in the Minority," has served to call to light two other somewhat amusing instances of the member of the court writing an opinion being much in the minority. In Nix *v.* Gilmer, 5 Okla. 740, the opinion by Judge Keaton contains four separate propositions and closes as follows: "All the other justices concurring in paragraphs 1, 2 and 3 of the foregoing opinion. None of them concur in paragraph 4 thereof [as long as the other three put together], and the reasoning therein contained expresses the views of the writer only." In Clark *v.* State, 167 Ala. 101, Mayfield, J., writing for the court, says: "The above are the views of the writer alone; but a majority of the court are of the opinion that the trial court did not err in refusing charge 3, requested by the defendant."

HELPING A GOOD CAUSE ALONG. — We sincerely hope the excellent citizens of Salt Lake City have responded generously to

the following frank and pressing invitation to "come" printed in a Utah newspaper. We are doing our share by reprinting the advertisement without the slightest hope or expectation of reward:

"Come ye that are heavy laden, bring your troubles to me."

Nothing too small to be noticed. Nothing too big to try for. Come one, come all. I need the money.

PORTRAIT.

D. L. OLESON.

LAWYER,

207 Boston Bldg. Bell Phone 4472, Ind. Phone 108.

SALT LAKE CITY, UTAH.

A LITTLE TAFFY. — In Hendrix *v.* United States, 2 Okla. Crim. 240, the accused assigned as error that his substantial rights had been disregarded by the trial court in limiting his counsel to thirty-five minutes in the argument of the case. The Appellate Court were of the opinion that there had been no error, and, after referring to the fact that Cicero had been allowed but half an hour to defend Caius Rabirius before the tribune of the people on a charge of murder, dismissed the assignment in the following soothing manner: "The trial court in this case, knowing full well the oratorical power and convincing logic of the distinguished counsel for the defense, concluded that he could do full and ample justice to the cause of the accused within the time limited, and, taking into consideration the entire record, it fails to disclose that the limit placed upon argument in this case was an abuse of discretion."

THE LAWYERS' SEAT. — There were eighteen lawyers seated about a fireplace. It was a raw, wet night. A stranger, wet to the hide, came in, tried to get accommodations and found not a room left. Shivering, the stranger looked at the fire, but the lawyers formed such a solid line about it that he could not get near it. Finally one of the lawyers, in a spirit of frivolity, turned to him and said:

"My friend, are you a traveler?"

"I am, sir. I have been all over the world."

"You don't say! Been in Germany, Egypt, Japan, and all the countries in Africa and Asia?"

"All of them, been everywhere."

"Ever been in hell?"

"Oh, yes, been there twice."

"How did you find things there?"

"Oh, much the same as here — lawyers all next to the fire." — *Salem News.*

A LITTLE LATIN IS A DANGEROUS THING. — The paragraph entitled "Latin Scholars, Beware," which recently appeared in these columns, has prompted a correspondent to call our attention to the brief of the respondent in Garnsey *v.* County Court, 33 Ore. 201. It is such a readable document that we reprint it in full:

"This is the first time in the judicial history of this state where an attempt has been made to revise or review by writ of review a judgment of a county court in the exercise of its jurisdictional powers as a probate court. Why? Because no lawyer who has any respect for his profession would compromise his reputation by displaying such dense ignorance of the constitution and laws of his state. There can be no writ of review in such cases. The only remedy is by an appeal. The allowance of attorney fees, charges and expenses rests in the sound discretion of the probate court, and its judgment in those matters will not be disturbed unless it can be shown it was corrupt. Now the attorney says that while Fred. H. Mills was administrator and I was his attorney there was no litigation in which the estate was a party. He knows he sued the administrator, Fred H. Mills, for over $14,000 at the November term, 1891, of the Circuit Court for Klamath County. If there had been a trial of that suit he would have paid the costs. I see he recollects my services to the estate in that suit. '*Hæret lateri lethalis arundo.*' In his additional brief he talks about 'multifarious litigation.' All lawyers know what a multifarious pleading is in equity, but who ever heard of a multifarious litigation? In his additional brief he calls the order of Judge Moore of July 12, 1895, a *brutum fulmen,* and in his original brief he calls it a *brutem fulmen.* Now what on earth he means by that I don't know. Evidently he is pretending that he knows something about the Latin language. But any tyro in that language would know from the inaptness of the phrases employed that he knew just as much about the Latin language and its appropriate legal and literary uses in the English language as a mule does about music. For the benefit of this attorney let me quote a single line from a great poet: 'A little learning is a dangerous thing.'"

A HITHERTO UNDISCOVERED HUMORIST. — Judge Roosevelt, who was a judge of the New York Supreme Court back in the 50's, is entitled to be ranked with the well-known humorists of the bench, such as Wilkes of Tennessee, Lamm of Missouri, Powell of Georgia, *et al.* We find an opinion written by him in 1854 in the case of Rector, etc., of Trinity Church *v.* Mayor, etc., of New York, 10 How. Pr. (N. Y.) 138, wherein judicial fun bubbles forth in superlative abundance. Speaking of the attempt of the plaintiff to secure exemption from taxation for nine lots on which it was proposed to erect a building for public worship, the judge said: "It is too clear for argument, that a contemplated structure, resting merely in imagination, no stone of which has ever been laid, or even extracted from its primitive quarry, is not such a building for public worship as an assessor is bound to see. When actually erected, it will be time enough

for the officer of the law to notice it. As yet it is merely a spiritual manifestation — 'situated' nowhere — certainly not on the nine 'lots,' and visible only to the eye of the mind, if indeed it be visible distinctly even to that. The law, to warrant the claim of privilege, requires an actual building — a house made with hands — not eternal in the heavens, but temporal, situated on temporal 'lots,' resting not on intention, however pious or praiseworthy, but on solid, sublunary earth." With respect to four other lots, also claimed as exempt by the plaintiff, Judge Roosevelt continued: "As to the other four lots, as I understand the complaint, they are actually devoted to the purposes of a cemetery. Now cemeteries, as such, except in the case of cemetery associations, formed under the general law, are not exempt. Does, then, the mere erection on them of a burial chapel confer the privilege? Such a building, it is obvious, is a mere incident to the cemetery. It is erected, not, in the sense of the statute, as a 'place of worship,' but, in the very language of this complaint, 'for religious services at interments.' All religious services, no doubt, more or less, partake of the nature of religious worship; but all are not 'public worship.' A building for public worship is an edifice devoted primarily, if not exclusively, to church services generally. Upon any other interpretation of the terms, as legal expressions, there would be no limit to the exemptions which might be claimed under them. Suppose a clergyman — as was proved on a recent trial — having a very extensive practice in matrimonial cases, should assign a particular room in his house, or, if necessary, his whole house, for religious services at interments of single women in the grave of matrimony — for marriage, it is said, is the burial of the separate existence of the sex — would such a devotion of the premises, however sacred, *ipso facto* convert the parson's dwelling into 'a building for public worship,' and exempt it, and all the lots, however numerous, on which it might be situated, from all secular taxation?"

Correspondence.

Solicitation of Business by Attorneys.

To the Editor of Law Notes.

Sir: I would be glad through your paper to have a few words to say, as to a lawyers duty. The Chicago Bar Association; and many other Associations, condemn solicitation of business by Attorneys. I differ from them. All Attorneys are officers of the Courts. All men are presumed to know the law. The laws are rules precribing what to do, and what not to do. If this is true all business ought to be don in accordance with the laws. If then a lawyer is an officer of the Courts, it is his duty to see to it, that this is don. If so, how can he except he tell the people, what the laws are; and how they business stand in accordance with the laws? A lawyer ought not sture-up strife for money: But if telling a purson what the law is, sture up strife let it come, the lawyer has don his duty. It is as much a lawyer duty to tell he people what the laws is; as it is for a teach to tell a child what a book is made for. A preacher to tell the world what Hell is made for. When a purson is doing his duty he ought not be condemed by any one. Therefore I differ from these Associations.

Percy G. Shadd,
Martin, Tenn. *Colored.*

Law Notes

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CONTENTS

Legislative Determination of Constitutional Questions.

THE substitution of the legislature for the courts as the proper body to determine the constitutionality of legislative acts, which has been proposed by certain so-called progressives, is about the most radical of the many new plans which have been foisted upon the public by persons with political ambitions. It would seem that the proposers of such a plan do not realize the difficulty which would be encountered in putting the plan in operation. The idea that a State constitutional provision would fill the bill appears to be in the minds of the advocates of the plan. But the fact is apparently overlooked that statutes of any great importance which are held to be unconstitutional are deemed to be in conflict with the United States Constitution, usually as taking property without due process of law or denying the equal protection of the law. The United States Supreme Court having jurisdiction to review the determination of a State court of last resort upholding the validity of an act against an attack thereon as violative of the Federal Constitution, no act of a State legislature which did in fact violate the provisions of the Federal Constitution could be conclusively determined by the legislature to be valid, even under a State constitutional provision, and the final determination of the validity of the act would rest with the United States Supreme Court. It would seem, therefore, that to accomplish the desired purpose an amendment to the United States Constitution would be necessary. How far such an amendment would operate to change the effect of the other provisions of that constitution, we shall not, at the present time, discuss. It would work a revolution in that instrument which contemplates a scheme of government whereby, according to the decisions of the United States Supreme Court, the judiciary is the guardian of the constitutional rights of the people.

Criminal Detection by Heart Pulsations.

FROM California comes the report of what is claimed to be the first demonstration in a court of justice of the Münsterberg theory of criminal detection by heart pulsations. The report states that the defendant in a criminal prosecution consented to become the subject of the test, and his normal pulse was found to be 79. The pulse increased to 91 when he gave his name as "James Smithers" and to 95 when informed by the judge that he was not telling the truth, which he admitted. In this instance of course the test worked to perfection. But suppose the defendant had been a timid female. When asked a simple question experience teaches us that she would have become at once confused, and in all probability the increase of heart pulsation upon making a truthful answer would have been at the same rate as the increase in the California case. What benefit in such a case would the increase in pulsation have been entitled to? Of course if an increase in pulsation is to be given weight as impeaching evidence a normal pulse must be considered as corroborating evidence, and if the defendant in the California case had "liquored up" before the trial the heart pulsation might not have increased, and might it not then have been said that the evidence of the defendant, corroborated by the liquor, should prevail over the evidence of two witnesses for the prosecution?

What Constitutes an "Instrument."

THE English Court of Criminal Appeal gave an important decision upon the question of what constitutes an "instrument" within the Forgery Act, 1861. Section 38 of that act provides that a felony is committed by a person who, "with intent to defraud, shall demand, receive, or obtain, or procure to be delivered or paid to any person, or endeavor to receive or obtain, or to cause or procure to be delivered or paid to any person, any chattel, money, security for money, or other property whatsoever, under, upon, or by virtue of any forged or altered . . ." Several persons were indicted under the above section upon the following evidence: A stamped envelope, inclosed in another envelope the corner of which was torn off to reveal the stamp, was posted and delivered to one of the prisoners. He then inclosed in the inner envelope, which had been delivered to him with the stamp canceled, a betting slip backing a horse which he knew to have won. This envelope was addressed and delivered by the others to a bookmaker, who paid the bet upon seeing that the postmark upon the envelope was put on previous to the time of the race in which the horse named on the slip had run. After trial and conviction, one of the prisoners appealed, on the ground that the envelope was not a "forged or altered instrument" within the above section. In *Reg.* v. *Riley,* 74 L. T. Rep. 254, [1896] 1 Q. B. 309, a post-office clerk sent to a bookmaker a telegram offering a bet on a horse for a certain race. The telegram, though purporting to have been handed in prior to the race, was in fact dispatched by the prisoner after he knew that the race had been won by the horse in question. The majority of the court for Crown Cases Reserved held that the telegram was a forged instrument within section 38. It was sought to distinguish the present case from that decision, on the ground that at the time the postmark was obtained the envelope was not

an instrument, and that it only became such after the betting slip was inserted. The Court of Criminal Appeal held that the material time to consider was that at which the bookmaker received the envelope containing the slip, and that at that time they constituted an instrument which was forged within the meaning of the section in question. An "instrument" generally imports a document of a formal legal kind, but, as Mr. Justice Wills pointed out in *Reg.* v. *Riley, supra,* the effect of section 38 would be undesirably restricted if such a construction were put upon the word "instrument" contained therein.

Proof of Handwriting.

THE rule, prevailing in the federal courts, which prohibits the introduction of genuine specimens of the handwriting of an accused person not already in the record, or that is not otherwise relevant, for the purpose of comparison with a document of disputed authorship, received the attention of Attorney-General Wickersham in his last annual report. The attorney-general mentions the difficulty of obtaining convictions for violations of the postal laws because of the rule with reference to handwriting evidence, especially in the case of accused persons who are well enough informed, or advised, to refrain from furnishing the government with a signature to any papers in the record. The report contains a recommendation that a measure be enacted similar to the bill introduced by the chairman of the judiciary committee at the first session of the Sixtieth Congress, which read as follows: "Be it enacted, etc., that in any proceeding before a court or officer of the United States where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses or by the jury, court, or officer conducting such proceeding to prove or disprove such genuineness."

That the federal rule, which also prevails in several States, excluding genuine specimens of handwriting for the purpose of comparison is an antiquated one, does not seem to admit of much doubt in view of the present advanced state of the chirographic science.

Municipal Liability for Damage by Mob.

IN *Chicago* v. *Sturges,* 32 U. S. Sup. Ct. Rep. 92, the United States court had under consideration the constitutionality of an Illinois statute making a city liable for three-fourths of the damage resulting to property situated therein caused by the violence of any riot or riotous assemblage of more than twelve persons, not abetted or permitted by the negligent or wrongful act of the owner. It was held that the statute was constitutional. The court said: "The law in question is a valid exercise of the police power of the State of Illinois. It rests upon the duty of the State to protect its citizens in the enjoyment and possession of their acquisitions, and is but a recognition of the obligation of the State to preserve social order and the property of a citizen against the violence of a riot or a mob. The State is the creator of subordinate municipal governments. It vests in them the police powers essential to the preservation of law and order. It imposes upon them the duty of protecting property situated within their limits from the violence of such public breaches of the peace as are mobs and riots. This duty and obligation thus intrusted to the local subordinate government is by this enactment emphasized and enforced by imposing upon the local community absolute liability for property losses resulting from the violence of such public tumults. The policy of imposing liability upon a civil subdivision of government exercising delegated police power is familiar to every student of the common law. We find it recognized in the beginning of the police system of Anglo-Saxon people. Thus, 'the hundred,' a very early form of civil subdivision, was held answerable for robberies committed within the division. By a series of statutes, beginning possibly in 1285, in the statutes of Westminster, coming on down to the 27th Elizabeth, the riot act of George I. and the act of George II., chap. 10, we may find a continuous recognition of the principle that a civil subdivision intrusted with the duty of protecting property in its midst, and with the police power to discharge the function, may be made answerable not only for negligence affirmatively shown, but absolutely as not having afforded a protection adequate to the obligation. Statutes of a similar character have been enacted by several of the States and held valid exertions of the police power. *Darlington* v. *New York,* 31 N. Y. 164, 88 Am. Dec. 248; *Fauvier* v. *New Orleans,* 20 La. Ann. 410; *Allegheny County* v. *Gibson,* 90 Pa. 397, 35 Am. Rep. 670. The imposition of absolute liability upon the community when property is destroyed through the violence of a mob is not, therefore, an unusual police regulation. Neither is it arbitrary, as not resting upon reasonable grounds of policy. Such a regulation has a tendency to deter the lawless, since the sufferer must be compensated by a tax burden which will fall upon all property, including that of the evil doers as members of the community. It is likewise calculated to stimulate the exertions of the indifferent and the law-abiding to avoid the falling of a burden which they must share with the lawless. In that it directly operates on and affects public opinion, it tends strongly to the upholding of the empire of the law."

Privileged Communications Between Dentist and Patient.

THE New York dentists are to endeavor to procure the enactment of a statute placing communications between a dentist and his patient, with reference to privilege, upon the same plane as communications between a physician and his patient or an attorney and his client. It has frequently been the case that identification has been made by the testimony of a dentist who has done certain dental work for a patient, and such testimony is apparently within the "communications" which would be privileged. It is not apparent upon what ground of public policy such communications should be excluded. It may well be that a criminal would prefer not to have a dentist who had treated him professionally testify against him, or that the dentist would prefer not to be compelled to be a witness against a former patient, but such considerations do not outweigh the benefits accruing to the public from the admission of such testimony.

Public Defenders.

SOMEWHAT in line with the advocation of the payment of lawyers from the public treasury, as public officers, mentioned in our last issue, is a bill recently introduced in the New Jersey legislature which provides for the creation of the office of "Public Defender" in counties

of the first class. The bill makes it the duty of the public defender to defend persons accused of crime, at the direction of the Common Pleas judge. This bill would do away with the practice of appointing attorneys to defend, without pay except in murder cases, accused persons unable to procure counsel, and would provide such persons with an attorney who would be a public officer, paid from the public treasury. A similar bill has been introduced in the New York legislature.

There can be no doubt that under the prevailing practice of appointing attorneys, who receive no pay, to defend poor persons, the accused, in most cases, receives about as much benefit from the services as the compensation of the attorney amounts to. Should the accused be so fortunate as to obtain the appointment of an attorney of ability, the usual practice is to endeavor to obtain a light sentence, rather than an acquittal, regardless of the guilt of the accused. Should the proposed measure become a law, and be carried out according to its intent and purposes, the constitutional right to counsel would be more fully extended than under the existing practice.

Recall of Attorneys.

AND now comes forth an advocate of the recall of incompetent attorneys! In this age when "recall" is the watchword of every man who ever pushed a pen or gave himself over to a flight of oratory, it is not surprising that, in a mad grasping for some new idea, the application of the recall to attorneys should have come down like manna from above to feed some hungering soul. With the recall of attorneys in vogue, no longer will the attorney for the defense dare lend himself to an assault upon the prosecuting witness as "a being who would sell his sister's honor with as little hesitancy and for less silver than Judas betrayed the Saviour," lest the friends of the witness "recall" him. No longer will the politician need worry over his creditors, for what lawyer would have the courage, in the face of the recall, to appeal to the courts against him! It has been pertinently suggested that in extending the recall to attorneys one step further should be taken in applying it to the physician who diagnoses a typhoid fever case as appendicitis, the pharmacist who fills a prescription for quinine with cinchonidine, or substitutes cosmoline for vaseline, the dentist who extracts a sound molar in a moment of mistaken identity, or the milkman whose wares taste of chlorine.

If competency is made the test of the recall, is the competency of an attorney to be judged by the number of cases he has, or wins, or his clothes, as indicating prosperity, or his promptness in paying his bills, or is it to be measured by the number of pleadings (modeled from some work on legal forms) which the courts hold sufficient to withstand all of the technical objections urged against them?

Finger Prints as Evidence.

THE Supreme Court of Illinois in the recent case of *People* v. *Jennings*, 96 N. E. Rep. 1077, had occasion to pass upon the admissibility in evidence of photographs of finger prints and of the testimony of experts as to the identity of two sets of finger prints. The accused in that case was convicted of murder in the first degree, and the expert evidence figured largely in the case. The Supreme Court, in holding that such evidence was admissible, said: "It is earnestly insisted, that this class of testimony is not admissible under the common-law rules of evidence, and as there is no statute in this State authorizing it the court should have refused to permit its introduction. No case in which this question has been raised has been cited in the briefs, and we find no statutes or decisions touching the point in this country. This class of evidence is admitted in Great Britain. In 1909 the Court of Criminal Appeals held that finger prints might be received in evidence, and refused to interfere with a conviction below though this evidence was the sole ground of identification. *In re Castleton's Case*, 3 Crim. App. 74. While the courts of this country do not appear to have had occasion to pass on the question, standard authorities on scientific subjects discuss the use of finger prints as a system of identification, concluding that experience has shown it to be reliable. 10 Ency. Britannica (11th ed.) 376; 5 Nelson's Ency. 28. See also Gross' Crim. Investigation (Adams' Trans.) 277; Fuld's Police Administration, 342; Osborn's Questioned Documents, 279. These authorities state that this system of identification is of very ancient origin, having been used in Egypt when the impression of the monarch's thumb was used as his sign manual, that it has been used in the courts of India for many years and more recently in the courts of several European countries; that in recent years its use has become very general by the police departments of the large cities of this country and Europe; that the great success of the system in England, where it has been used since 1891 in thousands of cases without error, caused the sending of an investigating commission from the United States, on whose favorable report a bureau was established by the United States government in the war and other departments. . . . We are disposed to hold from the evidence of the four witnesses who testified, and from writings we have referred to on this subject, that there is a scientific basis for the system of finger print identification, and that the courts are justified in admitting this class of evidence; that this method of identification is in such general and common use that the courts cannot refuse to take judicial cognizance of it." The court also held that it was not error to permit the finger print experts to testify positively that the finger prints discovered at the scene of the crime were made by the same person as the finger prints obtained of the accused after his arrest. In so holding the court said: "While it is usual for expert witnesses to testify that they believe or think, or in their best judgment, that such and such a thing is true, no rule of law prevents them from testifying positively on such subjects. It is for the jury to determine the weight to be given to their testimony."

While the Illinois case above cited appears to be one of first impression in an appellate court upon the admissibility of finger print evidence, such evidence has been received in numerous recent trials, among which might be mentioned a murder trial in New York in which that class of evidence was mainly relied upon in securing the conviction which followed. Finger print evidence presents many features which seem to place it above the other classes of expert evidence. One of the most striking differentiating features is the fact that, from the data now obtainable, it is possible for a finger print expert to state positively as to the identity of finger prints. It is believed that in all of the cases in which such evidence has

so far been made use of, in no instance has there been that conflict of opinion between the experts which is a disgusting feature of the testimony of so-called "alienists." Should this record continue, it is easy to foresee the weight which will be attached to such evidence by juries.

The Future Lawyer and His Library.

IT has been stated that from 1658 to 1896 there were reported approximately 500,000 cases, and for the next ten years an additional 250,000 cases, or 25,000 per year. Chancellor Kent in 1834 is reported to have complained of the multitude of law books, there being at that time about 200 volumes of American and about 650 volumes of English law reports, as compared with approximately 10,000 volumes of American and 6,000 volumes of English law reports at the present time. The publication of the figures which would result should the reports increase in numbers at the same rate for the next twenty-five years, together with an estimate of the cost of a working library at that time, is recommended as a preventive for an "overcrowded" condition in the profession.

"LEND A HAND."

A HALF-PAGE advertisement in the daily newspapers January 25th announced that the first of a series of articles on "Big Business and the Bench" appeared in the February number of *Everybody's Magazine*. "The characters are judges . . . those whose official records suggest that their decisions have been swayed by business reasons. . . . That is the kind of muckraking this is going to be. If you believe that one of the ways of honoring the just judge is by eliminating the unjust judge, come on and lend a hand." In the course of the article referred to, the author enumerates a multitude of muckraking feats that he promises to perform in succeeding articles, and among them is the following: "I shall prove that it is becoming more and more difficult for the poor and uninfluential litigant, even if his claim be just, to get a decision against a large corporation." The publishers of the magazine affirm that the articles are the outcome of "years of exhaustive study of the judiciary" by the author.

Two or three hours' "study of the judiciary" by examination of current decisions in the official reports will suffice to prove that it is *not* "becoming more and more difficult" for a poor plaintiff to prevail against a great corporation. And since the magazine writer asserts his purpose and ability to "show federal judges so corrupt that long since their impeachment should have been called for," and to "show them constantly hearing the cases of corporations in which their sons and nephews hold salaried positions," space will here be given only to consideration of the reported decisions of federal judges in a certain class of cases.

First, however, a few words of explanation for laymen or for lawyers whose specialty is rather in the literary than in the legal line. In *Finegan* v. *London, etc., R. Co.*, 53 J. P. 683, Denman, J., speaking of "questions of negligence," declared it to be "an undoubted but deplorable fact," that "in most cases they divide judges of great experience and great acuteness more than any other questions which have ever been discussed in courts of justice." There is not the slightest doubt that upon such questions a judge has exceptional opportunities for adopting a view favorable to a corporation litigant and "getting away with it" as far as serious consequences to the judge are concerned. And a federal judge, whose tenure of office does not depend upon periodical re-elections, is especially free to favor the wrong side on any question at all debatable. Specifically, in personal injury cases, so exceedingly numerous nowadays, he may easily and safely veto verdicts for very large amounts against defendants — verdicts for $10,000 and more are common — and thereby win the gratitude of corporations in whose service he may presently see his "sons and nephews hold salaried positions," or thereby evince his own gratitude for past favors. Now, what do the records disclose?

Volume 183 of the Federal Reporter, taken at random from the late reports in that series, shows the following cases of actions by (apparently) "poor and uninfluential" plaintiffs to recover damages for personal injuries or death caused by the alleged negligence of large corporation defendants, and involving pure questions of fact or mixed questions of law and fact concerning negligence or contributory negligence: *Fried & Reineman Packing Co.* v. *Hugel*, 183 Fed. Rep. 110 — Buffington, Lanning, and Cross, JJ.; *American Car and Foundry Co.* v. *Thornton*, 183 Fed. Rep. 114 — Buffington, Lanning, and Cross, JJ.; *Atlantic City R. Co.* v. *Clegg*, 183 Fed. Rep. 216 — Buffington, Lanning, and Cross, JJ.; *Delaware, etc., R. Co.* v. *Troxell*, 183 Fed. Rep. 373 — Buffington, Lanning, and Cross, JJ.; *Donovan* v. *Greenfield, etc., St. R. Co.*, 183 Fed. Rep. 526 — Aldrich, Colt, and Putnam, JJ.; *Pittsburgh & B. Coal Co.* v. *Hudak*, 183 Fed. Rep. 543 — Cross, Buffington, and Lanning, JJ.; *Memphis Consol. Gas & Electric Co.* v. *Creighton* — Severens, Warrington, and Knappen, JJ.; *Horan* v. *Boston, etc., R. Co.*, 183 Fed. Rep. 558 (rehearing denied, 184 Fed. Rep. 453) — Aldrich, Colt, and Putnam, JJ.; *Texas, etc., R. Co.* v. *Prater*, 183 Fed. Rep. 574 *per cur.* — Pardee, McCormick, and Shelby, JJ.; *Texas, etc., R. Co.* v. *Mayer*, 183 Fed. Rep. 575 *per cur.* — Pardee and Shelby, JJ.; *Imperial Woolen Co.* v. *Miller*, 183 Fed. Rep. 578 *per cur.* — Buffington, Lanning, and Cross, JJ.; *Erie R. Co.* v. *Schultz*, 183 Fed. Rep. 673 — Denison, Knappen, and Warrington, JJ.; *Erie R. Co.* v. *Russell*, 183 Fed. Rep. 722 — Noyes, Ward, and Lacombe, JJ.; *O'Hara* v. *Central R. Co. of New Jersey*, 183 Fed. Rep. 739 — Lacombe, Coxe, and Noyes, JJ.; *Spinello* v. *New York, etc., R. Co.*, 183 Fed. Rep. 762 — Coxe, Ward, and Noyes, JJ.; *Klauder-Weldon Dyeing Mach. Co.* v. *Gagnow*, 183 Fed. Rep. 962 — Coxe, Lacombe, and Noyes, JJ.; *Metropolitan Life Ins. Co.* v. *Hartman*, 183 Fed. Rep. 975 — Van Devanter, Hook, and Carland, JJ.; *American Steel & Wire Co.* v. *Tynan*, 183 Fed. Rep. 949 — McPherson, Gray, and Lanning, JJ. All of those cases were in the Circuit Court of Appeals and were jury trials in the court below. The judge first named in each case was the one who wrote the opinion, the others concurring, except in the two *per curiam* cases. The judges' names are given so that if one of them has been or shall be charged with unduly favoring corporations his behavior in the foregoing class of cases may interest a candid observer.

In thirteen of the cases a refusal of the trial judge to direct a verdict for the defendant was affirmed, and in three cases judgment on a directed verdict for the defend-

ant was reversed. In one a judgment for the plaintiff was reversed for an error of law, and in another where contributory negligence was "clear upon the plaintiff's own testimony." Evidently the "sons and nephews" could not expect to be rewarded for the services of those judges. Furthermore it is especially to be noted that in many of those cases the opinions in favor of the plaintiffs are not merely perfunctory and colorless statements, but the judge makes an argument for the poor plaintiff not equaled in the court below unless the plaintiff was there represented by a very able advocate.

In *O'Hara* v. *Central R. Co. of New Jersey,* 183 Fed. Rep. 739, the plaintiff's intestate, a domestic servant, was killed by train at a private railroad crossing, no signals having been given according to custom at that place on a foggy day. She was last seen actually on the track, and "seemed to be hurrying to get across" to avoid an approaching train which she unquestionably saw. The witness, attending to his work, turned his head away, and why she failed to take the two or three steps that would have placed her in safety was absolutely unexplained. Without a particle of evidence other than as above stated, Judge Lacombe taxed his ingenuity as follows: "She started to take them, quickening her pace; but at the first step the heel of her shoe caught in some hole in the ballast of the track or between the ballast and a tie, or her skirt caught on the projecting head of a spike, or she turned her ankle, the loss of equilibrium and intense pain bringing her to her knees, from which position, encumbered by her skirts, she could not rise in time to reach a place of safety." The judge said that these inferences "are certainly not impossible, nor even unreasonable, and so long as the proved facts admit such inferences, we cannot find as matter of law that the defendant has established its defense of contributory negligence." Surely that case does not furnish evidence that it is "becoming more and more difficult for the poor and uninfluential litigant, even if his claim be just, to get a decision against a large corporation."

In *Donovan* v. *Greenfield, etc., St. R. Co.,* 183 Fed. Rep. 526, an action for death by wrongful act, the trial judge directed a verdict for the defendant "presumably upon the ground that the defendant had a right to eject a badly intoxicated person from its car." Judgment on the verdict was reversed. Aldrich, J., writing the opinion (Putnam and Colt, JJ., concurring), declared that "when the relations of carrier and passenger exist, the carrier is bound to exercise greater care with respect to him than if he were sober;" that "the right of action results, of course, not from the fact of ejection, which, in the abstract, is justifiable, but from the fact that the party exercising the legal right unreasonably and carelessly subjects the helpless party to danger and consequential injury;" that "it is, of course, well understood that badly intoxicated persons may keep going while in a crowd and under excitement, but if left alone in the darkness and cold, that they are quite likely to fall into a stupor, regardless of any situation of danger; and we think that in this case the plaintiff was entitled to go to the jury upon the question whether the defendant, having reference to the known condition of intoxication, exercised its right of ejection in a reasonable manner . . . While it might not be culpably careless, but, on the contrary, proper, to eject a man in his right mind in such a place in the daytime in warm weather, it might amount to unwarrantable culpability to eject an intoxicated and helpless person at such a place on a cold winter night. The reasonableness of the ejection is something to be determined by a jury in a case like the one before us." It is almost certain that a corporation judge could have scrutinized the evidence closely enough to conclude that the defendant's servant was not negligent in failing to perceive that the passenger was in Feste's "third degree of drink" instead of the first or second degree.

In *Klauber-Weldon Dyeing Mach. Co.* v. *Gagnon,* 183 Fed. Rep. 962, Judge Coxe said: "The defendant's brief contains a persuasive argument to prove that the plaintiff's witnesses upon this question are mistaken and that some of them are unworthy of belief. If we were sitting as triers of the facts, it is quite possible we might agree with the contention of defendant's counsel in this regard." But the judge proceeded to make a strong argument supporting his decision in favor of the plaintiff on a pure question of fact.

In *Spinello* v. *New York, etc., R. Co.,* 183 Fed. Rep. 762, an action to recover damages for death caused by defendant's negligence, the trial judge directed a verdict for defendant on the ground that notice of the accident was not given as required by the State statute. The defendant had actual knowledge of the accident and the burden of proof of failure to give the requisite notice. The testimony it adduced on that point was acutely criticised in the opinion of Judge Coxe (Ward and Noyes, JJ., concurring), reversing the judgment below. "It is suggested that this is an exceedingly technical criticism," said he. "This is true, but it must be remembered that we are dealing with an exceedingly technical defense." Anything for muckrakers there?

In *Texas, etc., R. Co.* v. *Prater,* 183 Fed. Rep. 574, the court said: "It may be that the result in this case is to award damages to a negligent engineer, whose carelessness contributed to his injury, and that such result is against the interest of the railroads, their employees, and the general traveling public; but this was a matter for the trial judge and jury, and is outside of our cognizance on this writ of error."

The foregoing cases are merely illustrative of a vast number that appear in the Federal and State reports. They can be quickly found in any of the later volumes. Turning over a few pages will reveal one. Thus in *Deninger* v. *American Locomotive Co.,* 185 Fed. Rep. at p. 22 (Gray, Lanning, and McPherson, JJ.), the plaintiff's minor son was killed when working on a machine which the defendant's superintendent flippantly called "fool proof." Writing an opinion in behalf of the poor boy, Judge Gray said: "It is true that by constant and unremitting attention to those precautions which it is to be assumed he knew were necessary the danger might have been avoided; but can a place and situation in which a servant is required to work be said to be reasonably safe where possible excusable distraction of the operator's attention may cause the omission of some precaution necessary to his safety and where the penalty of such omission is instant death or serious bodily harm? . . . It will be for the jury to say," etc.

The magazine article gives an instance of alleged corruption of a judge. In Massachusetts lust and murder have sent a brilliant minister of the gospel on the way to

the electric chair. In England a clergyman of distinguished lineage has been dismissed from his office of chaplain in the royal household on account of unprintable offenses. Are there not in the ministry many other false and sin-stained creatures of sin and the dust, as Hawthorne gently characterized them in The Scarlet Letter? Must we expect an urgent invitation by a magazine to "come on and lend a hand" in exposing them?

CHARLES C. MOORE.

BURDEN OF PROOF AS TO "ASSUMPTION OF RISK."

At the present time, although perhaps not in earlier days, there is under and by virtue of our common-law rules a fundamental liability upon the master for all injuries that may occur to his servant without the latter's default. This becomes apparent when we analyze the doctrine of assumption of risk. The essence of that doctrine is knowledge on the part of the servant of the danger to which he is subjected by reason of his employment. If he is injured with full knowledge of the danger the master is not liable. But if, by reason of youth, lack of intelligence, or inexperience, he is unaware of the danger, the master is liable to make good his loss and injury. The master owes his servant a duty of warning and instructing in respect of the dangers inhering in the employment. Of course if those dangers are apparent to a person of the intelligence and attainments of the servant the duty is discharged by the circumstances themselves — the master need take no active measures to inform the servant. If, however, in any way a servant can make out a case wherefrom it appears that he was injured by a dangerous instrumentality of the master and that he had no knowledge, actual or constructive, of the danger to which he was exposed, he is entitled to recover.

It is commonly supposed that there are two theories of the law upon which the master is relieved of this fundamental liability. These are that the servant was guilty of contributory negligence and that he "assumed the risk" of the injury. As a matter of fact, however, there is no practical difference between these two defenses. They operate in exactly the same way, and have precisely the same effect. To all substantial intents and purposes they are equivalent. To understand the relation of one to the other we must first contemplate the conduct of the master with respect to the standard of care to which he is required to conform. If his conduct was below the standard — negligent — theoretically the servant must have been guilty of contributory negligence in order to defeat a recovery. On the other hand, if the master's conduct was of the character required by the standard of care — not negligent — the acknowledged defense to the servant's action is "assumption of risk." The one defense or the other is applicable according as you view the conduct of the master as being above or below the standard. It has been said elsewhere: "Assumption of risk certainly means that the master is not liable. He is not liable because he has not been guilty of any negligence, the injury being said to be attributable to one of the perils that inhere in the employment. The master may subject the servant to certain dangers without incurring responsibility for an injury which may result from the dangerous instrumentality. The limit of the amount of peril to which the master may subject the servant is that amount which exists in the same business as conducted by ordinarily prudent masters in the vicinity. Any danger to which the master subjects the servant over and above this limit (*i. e.*, the existing standard of care) imposes responsibility upon the master for a resulting injury. So we have conduct on the part of the master which is actionable (negligence) and conduct which is not actionable (assumption of risk) according as the conduct is below or above the existing standard of care. A very good illustration may be taken from the use or nonuse of blocking for guard rails and frogs. In the State of I., public policy as expressed by judicial decision declares that railroads need not block the frogs and guard rails of their tracks; in the State of O., public policy, acting through the judiciary or legislature, has announced that blocking is necessary to the safety of employees. In other words, the standard of care which a railroad company must exercise is different in the two States. If, then, a switchman gets his foot caught in an unblocked frog in the State of O., the railroad company is guilty of negligence, but if the accident occurred in the State of I. the switchman assumed the risk. Furthermore, before the public policy of the State of O. declared itself to be in favor of blocking, the same condition obtained as now exists in the State of I., and what is now negligence was then conduct expressed by the term 'assumption of risk.' Therefore what separates the conduct of the parties as described by the expression 'assumption of risk' from their conduct as expressed by the terms 'negligence' and 'contributory negligence,' is the existing standard of care, and this standard is the concept of court or legislature (public sentiment) at the particular time of the injury. There is no practical difference in the result whether we say that a servant is not entitled to recover because he assumed the risk, or whether we say that he is debarred from recovery because of contributory negligence. If you say 'contributory negligence,' thereby contemplating the conduct of both master and servant as being below the standard of care, or say 'assumption of risk,' thereby considering neither as being at fault, the result is the same; you merely lower the standard of care when you change your phraseology from the former to the latter mode of stating the case. The idea is that the servant's conduct bears such a relation to the master's conduct that there can be no recovery." 45 American Law Review 771. The result is, as naturally might be expected, that we find the court of one jurisdiction applying the terms "negligence" and "contributory negligence" to the conduct of master and servant under certain facts, and the court of another State referring to the conduct of the parties under a similar state of facts as that expressed by the phrase "assumption of risk."

Assuming that there is a fundamental liability upon the master for any injury that may occur to the servant by reason of the master's instrumentalities, let us see where the burden of proof rests in an action by the servant. The servant, of course, must make out a case warranting a recovery. Before the defendant master is called upon to introduce evidence, the plaintiff must show that he was injured by the instrumentality of the master and that he had no knowledge, actual or constructive, of the danger or risk to which he was subjected. If it appears from the facts developed by his own evidence that he was as fully aware of the danger as was the master, he must

be nonsuited — a common result where his evidence shows that he was of full age, ordinary intelligence, and experienced in the employment. The burden of proof then (meaning the burden of making a *prima facie* case) rests upon the servant at the outset. Supposing that the servant makes out a *prima facie* case — that is, he shows the fact of injury and that he was youthful or inexperienced — the master, in order to resist a recovery, must show that he warned and instructed the plaintiff respecting the danger. As to warning and instruction, the burden of proof should be borne by the master. This is new matter which he has set up in confession and avoidance. It may be urged that there is a presumption that the master has discharged his duty of warning his servant; but this ought not to be allowed to outweigh other considerations. The master presumably knows better than the servant whether he discharged his duty of warning. And we have, moreover, the fundamental liability of the master for any injury whatever, which he must avoid by showing knowledge on the plaintiff's part.

If the servant's case discloses that he had full knowledge of the danger, he yet may recover if he can show a "promise to repair" by the master. The burden of proof as to whether there was such a promise clearly is upon the servant, because it is part of the case which he relies upon as entitling him to recover, and because he is in a better situation to know of such a promise, having, as he claims, jeopardized his safety in reliance thereon.

It will be recognized that what has been set forth above respecting the issues in servants' actions is common to actions wherein either or both of the defenses of "assumption of risk" and contributory negligence are raised by the pleadings. These issues respecting knowledge are the only matters of substance of both defenses. Forsooth, the gist of the master's defense to the servant's action, whether termed "contributory negligence" or "assumption of risk," consists in "conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of under the circumstances known to the actor, that he is held answerable for that result." *Per* Mr. Justice Holmes in *Schlemmer* v. *Buffalo, etc., R. Co.*, 205 U. S. 12, 51 U. S. (L. ed.) 681, 27 Sup. Ct. Rep. 407. Whatever else the courts say about "contributory negligence" and "assumption of risk" is of no practical value and should be disregarded. The many metaphysical refinements that have been set forth in the opinions have served only to confuse investigators.

With these principles in view it may be possible in some measure to harmonize the apparent conflict in the decisions. As is well known, there is a sharp conflict of authority (so far as the wording of the opinions is concerned) as to which party sustains the burden of proof as to contributory negligence. Some courts assert that the plaintiff has the burden of showing the absence of contributory negligence, whereas other courts assert confidently that the defendant bears the onus of establishing the defense in question. Now considering "contributory negligence" to be knowledge of the danger on the part of the servant, and regarding the master as being fundamentally liable for any injury, as has been stated, we may reconcile the apparent inharmony in the following manner: The courts asserting that the burden of proving freedom from contributory negligence is upon the plaintiff, mean that the plaintiff must make out and sustain a case from the facts of which it appears that he was not aware of the danger. The courts asserting the contrary as to the burden of proof must admit the truth of this proposition. Manifestly if from all the facts proven it appears that the plaintiff was fully aware of the danger, his action must be dismissed. Again, the courts declaring that the burden of proof rests upon the defendant intend by this statement that if the defendant would defeat the plaintiff's action, it must appear that the plaintiff was aware of the danger. (Of course the defendant is entitled to the benefit of evidence of the plaintiff which tends to show knowledge of the danger.) Nor can there be any disagreement upon this proposition, because it unquestionably is true that a servant who is injured without knowledge of the danger is entitled to recover, as in case of an infant or inexperienced servant who has not been warned and instructed by the master.

If, as has been stated, "assumption of risk" is in substance the same thing as contributory negligence, it follows that any conflict as to which party bears the burden of proof may be reconciled in like manner. The burden of proof is as to the *knowledge* of the servant, and it rests in the first instance (that is, in making a *prima facie* case) upon the servant, and ultimately (by a preponderance of the evidence as to warning and instruction) upon the defendant.

The status of "assumption of risk" and contributory negligence in New York is very interesting. The Court of Appeals of that State has asserted many times that the burden of proving an absence of contributory negligence rests upon the plaintiff. A careful scrutiny of the decisions shows that the courts of this State mean that the plaintiff is not entitled to recover if, from all the facts, it is to be inferred that he knew of and appreciated the danger. (He is under no obligation to establish by direct evidence that he was unaware of the danger.) This position, it has been argued above, is not in conflict with the statement that the burden of proof rests upon the defendant. Such being the state of the law in New York, the case of *Dowd* v. *New York, etc., R. Co.*, 170 N. Y. 459, 63 N. E. Rep. 541, *affirming* 61 App. Div. 612, 70 N. Y. S. 1183, was presented for the court's consideration. It appeared that the plaintiff's intestate was killed while doing repair work under a railroad car, an employment which was dangerous because of a practice of the defendant company of moving cars onto the repair track. The case turned upon the plaintiff's knowledge of this practice; and the defendant, by an appropriate exception, raised the question of law that the evidence did not authorize the jury to find that the decedent was not chargeable with knowledge of the practice. The court found that "if the burden of proof was upon the plaintiff to show affirmatively the absence of knowledge on the part of her intestate, it may be that the evidence was insufficient for the purpose," but that "if the burden of proof in this regard was upon the defendant, the finding of the jury should be sustained because the evidence did not conclusively establish the fact in accordance with its theory." The court held that the burden of proof was on the defendant and affirmed the judgment for the plaintiff. The burden of proof referred to was the burden of proof as to "assumption of risk!"

BERKELEY DAVIDS.

New York.

LORD ERSKINE.

"ON Monday, the 6th April," Boswell enters in his diary, "I dined with him [Johnson, of course] at Sir Alexander Macdonald's, where was a young officer in the regimentals of the Scots Royal, who talked with a vivacity, fluency, and precision so uncommon that he attracted particular attention." This was Erskine, destined to become the most brilliant and successful advocate in the annals of the English Bar — an orator, as Lord John Russell said, with "the tongue of Cicero and the soul of Hampden." But it was some time before he found out his true vocation. For five years he was cruising about the West Indies as a midshipman. Then he bought a commission in the army, and was quartered in the island of Minorca. He was fond, says Croker, of telling how, while he was there, he not only read prayers to the regiment, but preached them sermons, and of boasting that he had been a sailor, a soldier, a lawyer, and a parson, and "wagged his pow" in a pulpit. But in those days of purchase in the army there was little chance for an officer unless he had means to buy his promotion, and, though Erskine's father was an earl — the Earl of Buchan — he had to keep up the dignity of the peerage and support a large family on an income of £200 a year.

"Tom Must Go to the Bar."

"Tom," said his mother, "must go to the bar and be Lord Chancellor." A casual incident gave his mind a strong impulse in that direction. He happened one day to go in his regimentals into an assize court in which Lord Mansfield was presiding. The chief justice was attracted by his appearance, inquired his name, and, having found out that he belonged, like himself, to an old Scottish family, he invited him to a seat on the bench, and explained to him the points of the case as it proceeded. Erskine's attention once engaged, he became keenly interested, felt that he could do as well if not better than the advocates he was listening to, and, at Lord Mansfield's suggestion, he decided to go to the bar. It needed some courage to take the step, for in those days it took five years to get called, and Erskine had a wife and a young family dependent on him — he had married while only eighteen. But by taking a nobleman's degree at Trinity College, Cambridge, he reduced the five years to three, living meanwhile with great economy, in small lodgings at Hampstead, on the proceeds of the sale of his commission. He openly avowed that he dined off "cow beef" because he could not afford any of a superior quality, and he went "so shabbily dressed," says Bentham, who knew him, as to be "quite remarkable" — all which redounds very much to his credit. He read law in the chambers of Wood and of Buller, afterwards the famous judge, and he practiced speaking at Robin Hood's, Coachmakers' Hall, and other debating societies or "spouting shops" of the time.

The First Brief — No Compromise.

One fine day in June, 1778, before being called to the bar, he went out — as he told the poet Rogers — to dine at a friend's. "When I arrived," he says, "dinner was begun. A tall man drew his chair aside, and I went into the gap. He — the tall man — talked much about the pictures, and so did I, though I knew little of the subject, turning that little to as good an account as I could. When dinner was over, the tall man drew my host aside and asked who I was. My host said I was a lawyer, and added much in my favor. 'Could I be prevailed upon to take a brief from his brother?' 'Perhaps I could,' said my host. I knew nothing of this conversation, but on my return home my servant, who had served under me in the Royals, and who, when he set my books in order, used always to place the Bible atop, as that, he said, was 'the best book,' told me that a cross, ill-looking man in a large gold-laced cocked hat had been twice inquiring for me. 'He insists, sir, upon seeing you, and is at this moment waiting for you in Bloomsbury Square coffee house.' I went, and there I found an old seaman with furrowed face. He was sitting gloomily in one of the boxes, with a small red trunk on the table before him, and his sword lying on the trunk. I mentioned my name. He said: 'There are my papers. Will you read them over?' It ended in my taking them home. The case was this: The old seaman was Captain Thomas Baillie, lieutenant-governor of Greenwich Hospital, and in a memorial addressed to the governors of the hospital he had exposed serious abuses in the hospital, and had reflected severely on the conduct of the parties having the management of it. This memorial was alleged to be a libel, and an application was made in the Court of King's Bench for a criminal information against the captain. Just before it came on for hearing, on the 1st Nov., a consultation of the captain's counsel was held. Three of them — Bearcroft, Peckham, and Murphy — leading men at the bar — were for consenting to a compromise, 'our client,' as Erskine says, 'to pay all costs.' 'My advice, gentlemen,' I said, 'may savor more of my late profession than my present, but I am against compromising.' 'I'll be damned if I do,' said Baillie, and he hugged me in his arms, crying, 'You are the man for me.' 'Then the consultation is over?' said Bearcroft. 'It is,' I replied. 'Let us walk in the gardens.'"

"When the cause came on, the senior counsel exhausted the day and the patience of the court. It grew dusk, and my turn arrived, when Lord Mansfield adjourned.

"This was exactly what I wished. I had the whole night to arrange in my chambers what I had to say the next morning, and I took the court with their faculties awake and freshened, and succeeded quite to my own satisfaction. When it was over the attorneys all flocked round me, and that night I went home and saluted my wife with sixty-five retaining fees in my pocket.

"'*Voilà* the nonsuit of cow beef, my good friends,'" he remarked, and so it proved. The Greenwich Hospital case, as he said long afterwards, "made his fortune." His intrepidity and firmness in this his first essay amazed both his auditors and the whole bar. When he was asked how he had the confidence to stand up so boldly against Lord Mansfield, he answered that he thought his little children were plucking his robe and saying, "Now is the time, father, to get us bread." No doubt the thought of the *res angustæ domi* may have acted as a spur, but it was not the source of his courage. That was inherent in his constitution, and distinguished him throughout his career as an advocate.

The Coming of Reform.

No finer stage for the display of his special gifts of intrepidity and forensic oratory could have been imagined than the England of 1780–1800. It was a time of great and growing political excitement. Jacobitism — the cause of the Stuarts — had received its death blow in the defeat of Prince Charles Edward at Culloden in 1745, but new forces were now at work, the same that were shortly in more volcanic France to culminate in the great Revolution. Some hailed them as beacon lights of liberty —

> "The goddess, heavenly bright,
> Profuse of bliss and pregnant of delight,"

as she is apostrophized by Addison; to others — like Burke — they were the red star of revolution, threatening social law and order and shaking the very pillars of the constitution. The friends of freedom, men like Horne Tooke, John Wilkes and Bentham, waged war with pamphlets and meetings. The government replied with prosecutions for seditious libels. The struggle centred in the jury. If the question of "libel or no

libel" was to be left to the jury, their sympathies were, for the most part, with the champions of popular rights. If the jury had to follow the direction of the judge as to its being a libel, and confine themselves to the question of publishing, the defendant was at the mercy of the Crown. The issue was a momentous one, and in the struggle Erskine was the protagonist of the popular side — no mere hireling advocate, but enlisted heart and soul, with an enthusiastic faith in the causes he fought.

A "Wicked and Turbulent" Dean.

The first of many in which he figured was the trial of Dr. Shipley, Dean of St. Asaph. It arose in this way: Sir William Jones, a London barrister, afterwards famous as an Orientalist and Indian judge, had composed a "Dialogue between a Scholar and a Farmer," illustrating the defects in the representation of the people in Parliament. Sir William Jones's brother-in-law, the Dean of St. Asaph, read the dialogue, and, being much interested in it, recommended it to a committee of gentlemen in Flintshire, calling themselves by the innocent name of "The Society for the Promotion of Constitutional Knowledge." This innocent title disguised, however, reforming designs, and the society's imprimatur made the Dialogue suspect. The dean was abused for encouraging revolutionary ideas; and, to defend himself, he published it, though, as he said, "with a rope around his neck." This only made matters worse, and the government in 1783 launched an information for a seditious libel against the dean as a person of "wicked and turbulent disposition." The first scene in the drama took place at Denbigh, when the attorney-general applied to have the trial removed to Shrewsbury, on the ground that the society had sent round a pamphlet containing misleading statements as to the rights of juries on trials for seditious libel which were likely to prejudice the hearing.

Erskine, in opposition, delivered an eloquent harangue in which he exhorted the presiding judge — Lord Kenyon — to remember that "these things were not being done in a corner," and he went on to ask, "When will the dean be tried? Never, if he is not to be tried now. And the purpose of these gentlemen is that he shall never be tried, as they are afraid of the triumph that an honest man must derive from the integrity and justice of the jury." Here some of the audience clapped, and Lord Kenyon, who clearly intimated that Erskine was "playing to the gallery," fined a gentleman £20. "Can it be otherwise?" retorted Erskine, in allusion to the applause, "when men are prosecuted in a free country for that in which the people conceive they have an interest?" However, Lord Kenyon prevailed, and the trial was removed to the assizes at Shrewsbury.

Libel or No Libel — Functions of the Jury.

There it came on before Mr. Justice Buller, a judge in his day second only to Lord Mansfield in authority. Erskine stoutly maintained his point that the question of libel or no libel was one for the jury, and that they were not limited to the question of publication only.

This contention Mr. Justice Buller, in his summing up to the jury, denounced with all the weight of his authority. "You have been pressed," he said, "very much by the counsel, and so have I, to give an opinion upon the question whether the treatise is or is not a libel. It is my happiness to find the law so well settled and so fully that it is impossible for any man who means well to doubt about it." Thus instructed, the jury returned a verdict of guilty, but with a qualification: "Guilty of publishing only."

Then ensued a long wrangle. What did the jury mean? Pressed by the judge, they said: "We do not find it a libel, my lord; we do not decide upon it."

Erskine: "They find it no libel."

Buller: "You see what is attempted to be done."

Eventually the judge put it to the jury this way: "Guilty of publishing, but whether a libel or not you do not find?"

Jury: "That *is* our meaning."

Then came the third scene in Westminster Hall, when Erskine moved for a new trial on the ground of misdirection. "My motive," he said, "is founded on the obvious and simple principle that the defendant has had in fact no trial, having been found guilty without any investigation of his guilt, and without any power left to the jury to take cognizance of his innocence," or, to put it shortly, "that the judge did not leave the defendant's intent to the jury." In the result, Lord Mansfield overruled the objections, held that Buller's direction was strictly in accordance with well-established practice, and cited with approval the old maxim, *Ad quæstionem juris non respondent juratores, ad quæstionem facti non respondent judices;* but, with all respect to Lord Mansfield, is not intention a question of fact — is not the state of a man's mind, as Lord Justice Bowen once put it, as much a question of fact as the state of his digestion?

Fox's Libel Act.

For the moment, however, Erskine stood defeated, but a year or two later his argument was vindicated and the matter settled by Fox's Libel Act (32 Geo. III., c. 60), which declared that on every trial of any indictment or information for making or publishing any libel the jury may give a general verdict of guilty or not guilty upon the whole matter, and shall not be required by the judge to find the defendant guilty merely on proof of publication.

This transference of power from the Crown to the people marks an era in our constitutional development and in the history of the freedom of speech, and Erskine's courageous championship of it remains his greatest service to his country. In Lord John Russell's memorable words, "It is to trial by jury more than even to representation that the people owe the share they have in the government of the country; it is to trial by jury, too, that the government mainly owes the attachment of the people to the laws." When, years afterwards, Erskine was raised to the peerage, the motto which he chose for his coat of arms was "Trial by Jury."

Defending Warren Hastings.

Stockdale's case was another state trial in which he secured an even more memorable triumph. The famous Warren Hastings trial was on, and Burke's splendid indictment of the great proconsul, drafted with all his native eloquence and power of invective, had been circulated in every corner of the kingdom. A Scotch minister — the Rev. John Logan — feeling the injustice to Hastings of this one-sided attack, and acting in the spirit of the old maxim, *Audi alteram partem,* published by way of counterblast a pamphlet in Hastings's defense. Forthwith he was arraigned for a contempt of Parliament. Erskine was his counsel, and wound up perhaps the finest performance ever given in Westminster Hall in the following words: "Gentlemen, the question you have therefore to try upon all this matter is extremely simple. It is neither more nor less than this: At a time when the charges against Mr. Hastings were, by the implied consent of the Commons, in every hand and on every table — when by their manager the lightning of eloquence was incessantly consuming him and flashing in the eyes of the public — when every man was with perfect impunity saying and writing and publishing just what he pleased of the supposed plunderer and devastator of nations — would it have been criminal in Mr. Hastings himself to remind the public that he was the native of a free land, entitled to the common protection of her justice, and that he had a defense in his turn to offer to them, the outlines of which he implored them in the meantime

to receive as an antidote to the unlimited and unpunished poison in circulation against him? This is without color or exaggeration the true question you are to decide. Because I assert without the hazard of contradiction that if Mr. Hastings could have stood justified or excused in your eyes for publishing this volume in his own defense, the author, if he wrote it *bona fide* to defend him, must stand equally excused and justified; and if the author be justified, the publisher cannot be criminal unless you had evidence that it was published by him with a different spirit and intention from those in which it was written. The question, therefore, is correctly what I just now stated it to be, Could Mr. Hastings have been condemned to infamy for writing this book? Gentlemen, I tremble with indignation to be driven to put such a question in England. Shall it be endured that a subject of this country may be impeached by the Commons for the transactions of twenty years — that the accusation shall spread as wide as the region of letters — that the accused shall stand day after day and year after year as a spectacle before the public, which shall be kept in a perpetual state of inflammation against him; yet that he shall not, without the severest penalties, be permitted to submit anything to the judgment of mankind in his defense? If this is the law (which it is for you to-day to decide), such a man has *no trial.* This great hall, built by our fathers for English justice, is no longer a court, but an altar; and an Englishman, instead of being judged in it *by God and his country,* is a victim and a sacrifice."

Arts of Advocacy.

Erskine's eloquence was aided by the gracefulness of his form, the beauty and expressiveness of his countenance, and the magic of his eye. Nor did he disdain the arts which might set off his natural gifts to the best advantage. Attired in the smart dress of the times — a green coat, scarlet waistcoat, and silk breeches — he was whirled in his chariot and four on special retainers to one provincial town after another. Arrived there, he would examine the court the night before the trial in order to select the most advantageous place for addressing the jury. On the cause being called, a crowded audience was perhaps kept waiting a few minutes before the celebrated stranger made his appearance, and, when at length he gratified their impatient curiosity, a particularly nice wig and a pair of new yellow gloves distinguished and embellished his person beyond the ordinary costume of barristers of the circuit. This theatricality would not be quite to the taste of the present day, but then to-day the orator — as Quintilian understood him — the orator as he wielded at will the assembly of statesmen and scholars of the eighteenth century — is no more. The orator, whether he belongs to the senate or the bar, has always had to condescend at times to artifice. Neither Demosthenes nor Cicero were above it. The Earl of Chatham calculated his dramatic effects as carefully as Garrick, and Burke himself, we know, once flung a dagger down on the floor of the House (it all but struck Erskine, by the way), exclaiming, with a melodramatic gesture, "These are the fruits of your French philosophies!" Have we not in our own day — *parva componere magnis* — seen the Big Loaf and the Little Loaf produced on a platform to point an economic argument?

An Artful Attorney.

The curious thing is that Erskine, with all these arts and all his intrepidity in the face of judge or jury, was easily upset by anything which touched his *amour propre.* Vanity was his foible, and he had all the susceptibility which attaches to it. One artful attorney, knowing this, used to plant a man in court, in full view of Erskine, to yawn hideously at his most eloquent appeals, or to titter at his most tragic tones. Once when Garrow, the well-known counsel, lost in thought, had fixed his eyes vacantly upon him, Erskine was so put out that he stooped down and hissed in his ear: "Who the devil do you think can get on with that wet blanket of a face of yours before him?" The same sensitiveness to criticism followed him into the House of Commons, and led to his being disconcerted in his maiden speech there by a piece of clever acting on the part of Pitt. High expectations had, of course, been formed of the *debut* of the great forensic orator, and Pitt — who never liked Erskine — sat, evidently intending to reply, with pen and paper in his hand, prepared to catch the arguments of this formidable adversary. He wrote a word or two. Erskine proceeded, but with every additional sentence Pitt's attention to the paper relaxed, his look became more careless, and he obviously began to think the orator less and less worthy of his attention. At length, while every eye in the House was fixed on him, he threw down his pen with an ostentatious gesture of contempt. Erskine was unnerved. His voice faltered; he struggled through the remainder of his speech, and then sank into his seat dispirited and shorn of his fame.

The House of Commons, it has often been said, is "strewn with the wrecks of lawyers' reputations." The phrase is too strong a one to apply to Erskine, but his performances there, "if not tame," as his enemies called them, were yet destitute of the animation which characterized his speeches at Westminster. Byron said that he never heard him there — in the House of Commons — but he wished him at the bar once more. "Nevertheless," as Lord Brougham remarks, "had he appeared in any other period than the age of the Foxes, the Pitts, of Burke, and Sheridan, there is little chance that he would have been eclipsed as a debater." Certainly no man of that generation rendered greater services to the cause of liberty, both inside and outside Parliament, than Erskine. He was the steady ally of Charles Fox, of Grey, and Sheridan. Most of the political reforms which we have to-day he had foreseen and advocated; for he belonged to the advanced guard of Liberalism, and had at all times the courage of his opinions. On the eve of the "Terror," in 1790, he paid a visit to Paris, and so enamored was he of the spirit of liberty which he saw there that he had a coat made, to wear in the House of Commons, with buttons and the motto, *Vivre libre ou mourir.*

The Gift of Wit.

One gift Erskine had which is generally lacking in the orator — wit. Eloquent as Cicero and Chatham, Pitt and Burke, Gladstone and Bright could be, no one would accuse them of wit in any but Barrow's sense of that term. Wit and humor are, in fact, conspicuous by their absence. Erskine was overflowing with it, though he used it sparingly in his speeches — a jest now and then with a jury. When on a summer's evening the leading counsel at the bar promenaded, as their custom was, in the Temple Gardens, in all the glory of cocked hats, ruffles, satin, small clothes, and silk stockings, Erskine — so Dr. Dibdin tells us — though a good deal shorter than his brethren, seemed somehow always to take the lead both in pace and discourse, and shouts of laughter would frequently follow his dicta. He was once observing to a brother barrister of the name of Lamb how much confidence in speaking was acquired from habit and frequent employment. "I don't find it so," said Lamb, "for, though I have a good share of business, I don't find my confidence increased, but rather the contrary." "Why," replied Erskine, "it is nothing wonderful that a Lamb should grow *sheepish.*"

"When you die I will write your epitaph," said the learned Dr. Parr to him one day. "My dear doctor," replied Erskine, "it is almost a temptation to commit suicide."

Once at Ramsgate he met some old friends, Mr. and Mrs. Maylem. The friend said his physician had ordered him not to

bathe. "Oh! then," said Erskine, "you are *malum prohibitum*." "My wife, however," went on the friend, "does bathe." "Oh! then," said Erskine, "she is *malum in se*."

At Sir Ralph Payne's house in Grafton street the leaders of the Opposition frequently met, and Erskine, having one day dined there, found himself so indisposed as to be obliged to retire after dinner to another apartment. Lady Payne, who was incessant in her attentions to him, inquired — when he returned to the company — how he found himself? Erskine took a bit of paper and wrote on it:

"'Tis true I am ill, but I cannot complain,
For he never knew pleasure who never knew Payne."

Done in the crack of a whip, like Sir Benjamin Backbite's epigram!

Some one has defined a "bore" as a person "who will talk of himself when you want to be talking of yourself." This was rather the case with Erskine. Charming as his conversation was, he contrived, says Hannah More, "to make it fall too much on himself."

"A goodly company," writes Lord Byron in his journal, "of lords, ladies, and wits. There was Erskine, good but intolerable; he jested, he talked, he did everything admirably, but then he would be applauded for the same thing twice over. He would read his own verses, his own paragraphs, and tell his own stories again and again — and then the trial by jury! I almost wished it abolished, for I sat next to him at dinner. As I had read his published speeches there was no occasion to repeat them to me."

The Woolsack and After.

On the formation in 1806 of what was called the Ministry of "All the Talents," Erskine was made chancellor. "Mind," said the King to Fox, "he is your chancellor, not mine." A more unsuitable appointment, in fact, could hardly be imagined, for Erskine knew next to nothing of equity. Soon after his elevation a friend met him with a book under his arm, which he laughingly pointed out, saying that he was studying "Cruise," an elementary digest of real property law; but with the help of Sir Samuel Romilly, the leader in his court, he got through his tenure of the woolsack — it only lasted thirteen months — without making any egregious blunders. There was, in fact, only one appeal from his decisions, and in this case — it was the Thellusson will — he was affirmed. The truth is, it is not so difficult for a judge of great natural acuteness and with a trained legal mind like Erskine to adjudicate rightly on an unfamiliar subject-matter when the different contentions are clearly put before him by able counsel. A lawyer's whole training is teaching him adaptability.

After he left the woolsack he found his occupation very much gone. But his villa at Hampstead was still a rallying place for the "forwards" in politics. He took up farming, too, and pointed out to his friends with pride his flock of 300 sheep. "I see," said Colman slyly, "your lordship has still an eye on the woolsack!" Particularly honorable to him were his efforts to prevent cruelty to certain reclaimed animals. His bill did not pass at the time, but he lived to see it pass under another proposer. His social gifts made him a *persona grata* everywhere, and, his wife being now dead and his children scattered, he "floated," it has been said, "a splendid waif, upon society." At the Regent's table, "Tom," as the Prince called him, was a great favorite. He loved to preside at the Benchers' table at Lincoln's inn, and, in the acquiescence of an unguarded hour, he was party to a most unreasonable by-law excluding all who wrote for the newspapers from the society — a by-law which nearly cost us the loss of Lord Campbell. As he grew older, he would cheer himself with the recollections of past triumphs, and show in what manner and by what arts of rhetoric he could, for instance, have convicted the Queen — Queen Caroline; and, when his host complacently observed that his arguments were unanswerable, he would reply: "By no means, my dear sir; had I been counsel for A., instead of B., you shall hear what I would have advanced on the other side." We smile, but we shall do well to remember the rebuke of Lord Kenyon to a young barrister who was retailing to him some silly, ill-natured gossip about Erskine. "Young man," said the chief justice, "what you have mentioned is most probably unfounded, but these things, even if they were true, are only spots in the sun." — *Law Times* (London).

Cases of Interest.

SUNDAY TELEGRAPH MESSAGE FROM HUSBAND TO WIFE AS WORK OF NECESSITY. — In Western Union Tel. Co. *v.* Fulling, (Ind.) 96 N. E. Rep. 967, it was held that a Sunday telegraph message from a husband to his wife telling her that late trains prevented him from being home till the following morning was a work of necessity, and within the exception of an Indiana statute prohibiting any work on Sunday save that of charity and necessity.

RECOVERY OF DAMAGES FOR FRIGHT RESULTING IN PHYSICAL PAIN. — In Arthur *v.* Henry, (N. C.) 73 S. E. Rep. 211, which was an action to recover damages for injury to the plaintiff's health caused by fright which in turn was caused by the blasting of rocks by the defendant in the vicinity of the plaintiff's house, it was held that the trial court correctly charged the jury that while mere fright was not actionable, yet if the plaintiff was frightened to such an extent that she suffered physical pain, and was made sick, and if such fright was brought about by the negligence of the defendant in blasting and was its proximate cause, it was actionable.

CONTRIBUTORY NEGLIGENCE OF PASSENGER INJURED WHILE ATTEMPTING TO BOARD A MOVING TRAIN AS QUESTION OF FACT. — In Hull *v.* Minneapolis, etc., R. Co., (Minn.) 133 N. W. Rep. 852, it was held that the question whether a passenger was chargeable with contributory negligence in attempting to board a moving train might or might not be one of fact for the jury, depending upon the facts and circumstances of the particular case, but that where the train did not stop a sufficient length of time to permit passengers to go aboard, was moving slowly by the station platform, and the passenger making the attempt was physically active, his freedom of action unimpeded, and there were reasons justifying his attempt to take the particular train, the question was one of fact.

VIOLATION OF ORDINANCE REGULATING SPEED OF AUTOMOBILES AS NEGLIGENCE PER SE. — In Whaley *v.* Ostendorff, (S. C.) 73 S. E. Rep. 186, which was an action for damages alleged to have been sustained by the plaintiff through the negligence and reckless misconduct of the defendants in running an automobile, whereby the plaintiff was injured while he was upon the crossing of two public streets, the complaint alleged that at the time the plaintiff was struck by the automobile it was being driven at a rate of speed in excess of that permitted by an ordinance regulating the speed of automobiles on such streets. There was a verdict and judgment for the defendants, which was reversed on appeal on the ground that the trial judge incorrectly charged the jury that to violate a city ordinance regulating the running of an automobile was *prima facie* evidence of negligence, whereas the jury should have been charged that to violate the ordinance was negligence *per se*. It was said, however, that the fact that such violation was negligence *per se* did not tend to make the negligence actionable, as the question

whether negligence was actionable depended upon the further question whether it was the direct and proximate cause of the injury.

LIABILITY OF HUSBAND FOR SLANDER BY WIFE. — In Poling *v.* Pickens, (W. Va.) 73 S. E. Rep. 250, it was held that notwithstanding the Married Woman's Separate Act of West Virginia a husband was liable for slander by his wife. The court said: "The rule of the common law is that the husband is liable for slander by the wife. It is contended that this is no longer in our time the law, owing to the acts providing for the separate estate of the wife and the rights to sue and be sued and to contract. The authorities conflict on this question, but preponderance of authorities is that the rule of the common law yet prevails. In obiter expressions in Gill *v.* State, 39 W. Va. 479, 20 S. E. Rep. 568, 26 L. R. A. 655, 45 Am. St. Rep. 928, and Withrow *v.* Smithson, 37 W. Va. 761, 17 S. E. Rep. 316, 19 L. R. A. 762, I condemn this rule, but it yet prevailing in this State. These dicta were given force of law in Kellar *v.* James, 63 W. Va. 139, 59 S. E. Rep. 939, 14 L. R. A. N. S. 1003, in which case Judge Poffenbarger carefully discussed the question. We are asked to reconsider the matter. We decline to rediscuss it. The authorities are given in those cases. I cite the case of Henley *v.* Wilson, 137 Cal. 273, 70 Pac. Rep. 21, 58 L. R. A. 941, 92 Am. St. Rep. 160, holding the common-law rule still in force, notwithstanding the Married Women's Act. . . . I refer also to volume 9, p. 1225, of the late valuable work, Am. & Eng. Ann. Cas., where we find a full note of cases in many States holding that the old odious rule of the common law making the husband liable for torts of the wife still prevails, and that action therefore must be brought against both, and judgment rendered against both."

LIABILITY OF PUBLIC CHARITABLE HOSPITAL FOR NEGLIGENCE OF NURSE CAUSING INJURY TO PAY PATIENT. — In Taylor *v.* Protestant Hospital Assoc., (Ohio) 96 N. E. Rep. 1089, it was held that a public and charitable corporation engaged in operating, maintaining and supporting a public charitable hospital was not liable for the negligence of a nurse resulting in the death of a pay patient. The court in their opinion referred to the leading case of McDonald *v.* Massachusetts General Hospital, 120 Mass. 432, wherein the Massachusetts court, in deciding a case having similar facts to those in the Ohio case, said: "The fact that its funds are supplemented by such amounts as it may receive from those who are able to pay wholly or entirely for the accommodation they receive does not render it the less a public charity. All sums thus obtained are held upon the same trust as those which are the gifts of pure benevolence. . . . If, however, any contract can be inferred from the relation of the particular parties, it can be only on the part of the corporation that it shall use due and reasonable care in the selection of its agents. . . . The liability of the defendant corporation can extend no further than this: If there has been no neglect on the part of those who administered the trust and control its management, and if due care has been used by them in the selection of their inferior agents, even if injury has occurred by the negligence of such agents, it cannot be made responsible. The funds intrusted to it are not to be diminished by such casualties, if those immediately controlling them have done their true duty in reference to those who have sought to obtain the benefit of them."

PROVING TESTIMONY OF PLAINTIFF AT PREVIOUS TRIAL BY ONE WHO HEARD IT. — In McRorie *v.* Monroe, (N. Y.) 96 N. E. Rep. 724, it appeared that at the trial of the case it became very important for the defendant to show, if he could, that the plaintiff's testimony varied from the testimony given by him at a former trial of the case, and he sought to show the inconsistency by means of a witness who was present at the former trial, heard the testimony which the plaintiff there gave and remembered it. The trial judge refused to allow the defendant to prove by the witness what he heard the plaintiff testify to on the former trial, and exception was duly taken to his ruling in this respect. On appeal after a judgment for the plaintiff the Appellate Division of the Supreme Court in the Fourth Department held that the ruling was correct, but the Court of Appeals took a contrary view and reversed the judgment on the ground that the ruling constituted harmful error. In doing so the court said: "The defendant was endeavoring to show that the plaintiff had admitted upon the previous trial a course of conduct on his part inconsistent with his contentions upon the present trial. 'In a civil action, the admissions by a party of any fact material to the issue are always competent evidence against him wherever, whenever, or to whomsoever made.' Reed v. McCord, 160 N. Y. 330, 341, 54 N. E. Rep. 737, 740. At common law, whenever it was desired to prove the testimony given upon a former trial, it was always permissible to prove it by the recollection of any person who heard it, and who would undertake to narrate it correctly. In Doncaster *v.* Day, 3 Taunt. 262, Lord Mansfield said: 'What a witness has sworn may be given in evidence, either from the judge's notes, or from notes that have been taken by any other person who will swear to their accuracy; or the former evidence may be proved by any person who will swear from his memory to its having been given.' In Johnson *v.* Powers, 40 Vt. 611, it was said that 'former evidence may be proved by any person who will swear from his memory to its having been given.' In McGeoch *v.* Carlson, 96 Wis. 138, 71 N. W. Rep. 116, it was held that a justice of the peace was competent to testify as to the evidence given before him on a former trial. In State *v.* McDonald, 65 Me. 466, the government, to impeach one of the defendant's witnesses, offered to show that he testified differently, at a former trial, by a witness who was present and heard him testify. The testimony was objected to, on the ground that it was not the best evidence, and that the legally appointed stenographer who took notes of the testimony could give better evidence. The objection was overruled, and the impeaching witness allowed to testify. This action on the part of the trial court was approved by the Supreme Judicial Court of Maine, which said, through Walton, J.: 'A witness may be impeached by showing that he testified differently at a former trial; and his former testimony may be proved by any one who heard and recollects it. There is no rule of law which makes the stenographic reporter the only competent witness in such a case. The rule which requires the production of the best evidence is not applicable. . . . It has nothing to do with the choice of witnesses. It never excludes a witness upon the ground that another is more credible or reliable.' These authorities suffice to show the general recognition of the rule which was violated by the refusal to permit proof of the plaintiff's former testimony by a witness who had heard it given."

RIGHT OF WIFE ABANDONED BY HUSBAND TO RECOVER MONEYS EXPENDED BY HER FOR NECESSARIES. — In De Brauwere *v.* De Brauwere, (N. Y.) 96 N. E. Rep. 722, it appeared that the plaintiff, a married woman, who had been abandoned by her husband, sued the husband to recover moneys which she had been compelled to expend out of her separate estate to provide necessaries for herself and her three infant children. Her separate estate consisted of the proceeds of her own labor as a seamstress and janitress and in part of a small sum of money received by way of inheritance from a deceased relative. After he abandoned his family the defendant contributed nothing toward their support except the sum of fifty dollars, and although the plaintiff endeavored to procure necessaries for herself and her children upon his credit she was unable to do so. About the time when the husband left his family, the wife caused him

to be arrested on a charge of abandonment, and he was ordered to pay her six dollars a week; but he refused to comply with the order, and removed from the State of New York into the State of New Jersey, where he resided at the time of the commencement of the action. The defendant demurred to a complaint setting forth the facts substantially as they have been stated. His demurrer was overruled at a Special Term of the Supreme Court, and an interlocutory judgment was rendered in favor of the plaintiff, which was affirmed by the Appellate Division of the Supreme Court. The court in affirming the judgment said: "We may assume that a husband is liable in equity to one who furnishes necessaries requisite for the support of his deserted wife and infant children, or to one who furnishes the wife with money with which to procure such necessaries. In the present case, however, the money used for procuring the necessaries was chiefly the outcome of the wife's own labors, and the question is whether she can maintain an action against the husband to recover it. Clearly no such action was maintainable at common law. At common law the personal property of the wife and all her earnings belonged to the husband. In this State, however, her marital disabilities have been wholly removed by statute, and the law now presumes that a married woman is alone entitled to any wages, earnings, or any other remuneration for services which she renders. Such compensation constitutes a part of her separate estate, and she can maintain any action in reference thereto which she could maintain if she were unmarried. The learned judge who tried the case at Special Term was inclined to think that the plaintiff's right to recover should be sustained upon the doctrine of subrogation; the wife being subrogated to the rights of the persons who furnished the necessaries for herself and the children, and whom she has paid therefor. We prefer to place his liability on a different ground. The husband was unquestionably under a legal obligation to provide his wife and children with the necessaries of life suitable to their condition. This liability would have been enforceable by the wife in her own behalf and in behalf of her infant children, were it not for her disability at common law to sue her husband. That disability having been removed, a wife who has applied her separate estate to the purpose of an obligation resting primarily upon her husband may now recover from him the reasonable amounts which she has thus expended out of her separate estate in discharge of his obligation. In other words, under the common law such a claim as that in suit was not enforceable, because a married woman was incapable of owning any separate estate and likewise incapable of maintaining an action at law against her husband. These obstacles have been removed by placing a married woman on the same footing with a woman who is unmarried in respect to her property rights, and by permitting her to enforce such rights in the courts against her husband no less than against strangers. The plainest principles of justice require that a wife should have some adequate legal redress upon such a state of facts as that set forth in this complaint, and the beneficial character of our legislation removing the former disabilities of married women could not be evidenced more forcibly than it is in its application to the present case."

RIGHT OF PERSONAL REPRESENTATIVE OF DECEASED WRITER OF LETTER TO ENJOIN PUBLICATION OF SAME. — In Baker *v.* Libbie, (Mass.) 97 N. E. Rep. 109, it appeared that the plaintiff, as executor of the will of Mary Baker G. Eddy, the founder of "Christian Science," so called, sought to restrain an auctioneer of manuscripts from publishing for advertising purposes and from selling certain autograph letters of his testatrix. These letters were written in her own hand by Mrs. Eddy, as was said, "during one of the most interesting periods of her career, that is, just after the publication of her Science and Health with Key to the Scriptures," in 1875. It was averred in the answer that the letters had no attribute of literature, but were merely friendly letters written to a cousin about domestic and business affairs. Extracts from the letters showed that they referred to household matters, to health and to the work she was doing. It was held that the plaintiff was entitled to an injunction. The court said: "The questions raised relate to the existence, extent and character of the proprietary right of the writer of private letters upon indifferent subjects not possessing the qualities of literature and to the degree of protection to be given in equity to such rights as are found to exist. These points have never been presented before for decision in this commonwealth. . . . The author has deceased. Moreover, there appears to be nothing about these letters, knowledge of which by strangers would violate even delicate feelings. Although the particular form of the expression of the thought remains the property of the writer, the substance and material on which this thought has been expressed have passed to the recipient of the letter. The paper has received the impression of the pen, and the two in combination have been given away. The thing which has value as an autograph is not the intactable thought, but the material substance upon which a particular human hand has been placed, and has traced the intelligible symbols. Perhaps the autographic value of letters may fluctuate in accordance with their length or the nature of their subject matter. But whatever such value may be, in its essence it does not attach to the intellectual but material part of the letter. This exact question has never been presented for adjudication, so far as we are aware. There are some expressions in opinions, which, dissociated from their connection, may be laid hold of to support the plaintiff's contention. See Dock *v.* Dock, 180 Pa. 14, 22, 36 Atl. Rep. 411, 57 Am. St. Rep. 617; Eyre *v.* Higbee, 22 How. Pr. (N. Y.) 198; Palin *v.* Gathercote, 1 Coll. 565. It may well be that such as appears to exist in the recipient may go to the extent of being assets in the hands of a decedent, a bankrupt, or an insolvent. Eyre *v.* Higbee, 22 How. Pr. (N. Y.) 198; Sibley *v.* Nason, 196 Mass. 125, 81 N. E. Rep. 887, 12 L. R. A. N. S. 1173, 124 Am. St. Rep. 520. But on principle it seems to flow from the nature of the right transferred by the author to the receiver and of that retained by the writer in ordinary correspondence, that the extent of the latter's proprietary power is to make or to restrain a publication, but not to prevent a transfer. The rule applicable to the facts of this case, as we conceive it to be, is that in the absence of some special limitation imposed either by the subject-matter of the letter or the circumstances under which it is sent, the right in the receiver of an ordinary letter is one of unqualified title in the material on which it is written. He can deal with it as absolute owner subject only to the proprietary right retained by the author for himself and his representatives to the publication or nonpublication of ideas in its particular verbal expression. In this opinion, publication has been used in the sense of making public through printing or multiplication of copies. The result is that an injunction may issue against publication or multiplication in any way, in whole or in part, for advertising or other purposes, of any of the letters described in the bill, and allowing the plaintiff, if he desires, to make copies thereof within a reasonable time, but going no further."

"I KNOW that there have been lawyers in the past so learned that they would decide any point regardless of the practical consequences of their judgments. There have been judicial cynics who held that the *argumentum ab inconvenienti* was always and necessarily bad. I do not pretend to be the equal of any of those." *Per* Darling, J., construing an Act of Parliament in Kingston-upon-Hull *v.* Hackney Union, [1911] 1 K. B. 763.

New Books.

The American Year Book. A record of events and progress for the year 1911. Edited by Francis G. Wickware, B. A., B. Sc. Pp. xx + 863. D. Appleton & Co. New York and London, 1912.

We had occasion last year to notice the publication of the first volume of the American Year Book. The second volume is now before us with its record of events and progress during the year last past. The editor of the first volume, Mr. S. N. D. North, has given way to Mr. Francis G. Wickware, who has followed the lines of the first volume. We find such general heads as Comparative Statistics; History and Politics; Government; Economic and Social Questions; Public Works and National Defense; Industries and Occupations; Science and Engineering, and the Humanities. There are subdivisions of each head. Thus under the general head History and Politics are the subheads American History, Industrial Relations, and Foreign History. The editor has had the assistance of a supervisory board representing national learned societies, and numerous scholars and specialists have contributed to make the present volume of the Year Book a full and satisfactory record of the happenings of the year 1911.

Classics of the Bar. By Alvin V. Sellers. Volume Two, pp. 321. Classic Publishing Co., Baxley, Ga. 1911.

On opening this volume our eyes fall on Judge Gaynor's address to the Thursday Morning Club of Great Barrington, Mass., in 1897, the subject of the address being "The Trial of Jesus from a Legal Standpoint." We would hardly call an address before a woman's club a "Classic of the Bar," especially an address delivered as late as 1897. However, we will not quarrel with Colonel Sellers because the title of the book is not sufficiently comprehensive to cover the contents. The address is good reading, and there are real classics of the bar included therein, such, for instance, as "The Murder of Joseph White," an address by Mr. Webster to an Essex county (Mass.) jury. To most of us probably the mere reading of the title of this address gives rise to memories of the speaking contests of our school days. Other acknowledged classics of the bar contained in the little volume are Senator Voorhees' speech in the case of Kilbourn *v.* Thompson, and Senator Vest's "Tribute to the Dog." The latter address was to a jury in a damage case involving $200, wherein it was alleged that the defendant killed the plaintiff's dog. The address so affected the jury that it is related that their verdict was for $500, and some of the jurors wanted to hang the defendant. There are still other classics which are worth one's perusal, and which may be found contained in this second volume.

A Manual of American Criminal Law, including Forms and Precedents. By Lewis Hochheimer of the Baltimore Bar. Pp. 337. King Brothers, Baltimore, 1911.

The author states that the plan of his book is that of a compendium or summary of the whole body of the criminal law. It is divided into two parts, the first containing the rules and principles of the substantive law of crimes, and the second criminal procedure. In this second part we find a consideration of the law of arrest, commitment and bail, the law governing indictments and criminal pleading, the rules of evidence and practice in criminal cases, and the law relating to special proceedings, embracing search warrants, surety of the peace, inquisition of homicide, extradition, habeas corpus, and certiorari. Furthermore, there is a collection of precedents of indictments and miscellaneous forms. The author has based his text on adjudicated cases decided in the various jurisdictions of this country and England, and considering the size of the book there are references to an unusual number. This is owing to the fact that the propositions of law are very briefly stated. The author might perhaps be criticised for attempting to cover so broad a field in so little space, but he cannot be accused of lack of industry, and the volume is probably as satisfactory a summary of the whole body of criminal law as one could get in so small a compass.

The Constitutions of Ohio. By Isaac Franklin Patterson, A. M., LL. B. Pp. 358. The Arthur H. Clark Company, Cleveland, Ohio, 1912.

The publication of the compilation at hand was doubtless due to the fact that there is now assembled in Ohio a constitutional convention for the purpose of tinkering with the present State constitution, which Governor Harmon seems to think does not need much tinkering, if he has been correctly quoted by the newspapers. The compilation in question contains the various constitutions of Ohio, amendments and proposed amendments, the Ordinance of 1787, the Act of Congress dividing the Northwest Territory, and the Acts of Congress creating and recognizing the State of Ohio. There are also historical data in connection with these texts, records of the vote cast, contemporary newspaper comment, detailed comparisons, and a historical introduction. We venture to say that the compilation is already in constant use by members of the Ohio Constitutional Convention, and by those who are closely following the deliberations of that body.

Claims — Fixing Their Values. By George F. Deiser, A. B., LL. B., of the Philadelphia Bar, and Frederick W. Johnson, former assistant general claim agent. Pp. ix + 158. McGraw-Hill Book Company, New York, 1911. $2 net.

The authors of this volume have given an exceedingly interesting insight into the adjustment of claims for personal injuries. What they have to say is not based on what can be found in adjudicated cases, but is the result of experience gained in handling claims. The various elements to be considered in determining the justness of a claim and fixing its value are taken up and discussed by specialists on the subject, and the whole has been done so well that it should appeal strongly to lawyers engaged in handling personal injury cases.

Manual of Mental Science. By Leander Edmund Whipple. Pp. 221. American School of Metaphysics, New York. 1911. $1.

The lawyer will not find in this manual of mental science anything calculated to increase his knowledge of law, but he, like persons in other walks of life, needs to approach his work with a healthy mental outlook, and a study of mental science will help him to achieve this result. The little book before us is suggestive, and the various rules there laid down if only partially followed would increase our efficiency and help us to get more out of life than possibly we do now.

"As to the promise of the defendant not to marry again, it was merely an expression of intention on his part shortly after he became a widower, not to marry again." *Per* MacMahon, J., in Bradley *v.* Bradley, 19 Ontario Law Rep. 525, 533.

News of the Profession.

THE ALABAMA STATE BAR ASSOCIATION will hold its next annual meeting in Montgomery, Ala., on May 17 and 18.

THE DISTRICT JUDGES OF KANSAS held their fifth annual meeting in Topeka, Kan., on Jan. 29.

THE DISTRICT ATTORNEY'S ASSOCIATION OF CALIFORNIA held its first annual convention at Sacramento on Jan. 23 and 24.

THE INDIANA BAR ASSOCIATION has decided upon South Bend, Ind., as the place for holding its next annual convention in July.

RESIGNATION OF VIRGINIA JUDGE. — Judge Walter A. Watson of the Fourth Judicial Circuit of Virginia has resigned from the bench to become a candidate for Congress.

APPOINTED ASSISTANT UNITED STATES ATTORNEY. — Attorney-General Wickersham has appointed Louis E. Shela, of Seattle, Wash., assistant United States attorney for Western Washington.

THE CONNECTICUT STATE BAR ASSOCIATION held its annual meeting at Bridgeport, Conn., on Feb. 12. Further particulars will be given in the next issue of LAW NOTES.

ELECTED DEAN OF LAW SCHOOL. — Homer Albers, of Boston, Mass., has been elected dean of the Boston University law school, succeeding A. R. Weed, who has been acting dean for the past year.

DEATH OF FORMER COLORADO JUDGE. — Judge Adair Wilson, formerly of the Colorado Court of Appeals, one of the leading Democrats in Colorado and a companion of Mark Twain in the newspaper field in Nevada, died on Jan. 7 at Berkeley, Cal.

CHANGE IN TEXAS COURT. — Associate Justice John Bookhout, of the Fifth Court of Civil Appeals, in Dallas, Tex., resigned from the bench on Jan. 30. Charles A. Rasbury, of Dallas, was appointed to fill the vacancy.

NOTED LAWYER'S CAREER ENDED. — Ulric Sloane, of Columbus, Ohio, former law partner of ex-Senator Joseph B. Foraker, died at Cincinnati on Jan. 21, at the age of sixty-one years. Mr. Sloane was one of the best known criminal lawyers in the country, and in legal circles was recognized as an authority on criminal law, particularly with reference to cases in which the question of insanity was involved.

ELECTED PRESIDENT OF WEST VIRGINIA COURT. — Judge Henry Brannon has been elected president of the Supreme Court of Appeals of West Virginia for the year 1912. This makes Judge Brannon's fifth term as presiding officer of the court. At the end of the present year he will have served two full terms of twelve years each, a longer term of service than that enjoyed by any other judge in the history of the court.

KANSAS STATE BAR ASSOCIATION. — The twenty-ninth annual meeting of the Kansas State Bar Association was held at Topeka, Kan., on Jan. 30 and 31. The annual address was delivered by President Harry B. Hutchins, of Ann Arbor University. Other speakers were W. E. Hutchinson, of Garden City, president of the association; William Osmond, of Great Bend; H. C. Sluss, of Wichita; F. Dumont Smith, of Hutchinson; Lee Bond, of Leavenworth; and Robert Stone, of Topeka. The annual banquet was held on the evening of Jan. 31.

OHIO JURIST CALLED BY DEATH. — Judge William B. Crew, former member of the Supreme Court of Ohio, died at Marietta, Ohio, on Jan. 24. Judge Crew was born in Morgan county, Ohio, on April 1, 1852. He received a part of his education at the Ohio State University. He also attended the Westtown College. He studied law at the Union Law School, from which he was graduated in 1874. Two years later he was elected prosecuting attorney of Morgan county. He was elected a member of the Ohio general assembly in 1889, and served on the Common Pleas bench from 1891 to 1902, when he was promoted to the Supreme bench to succeed Judge M. J. Williams, who died in office. He was elected to succeed himself in November, 1902, and retired from that court by expiration of his term last February.

COMING CHANGES IN NEW YORK COURT OF APPEALS. — Because of the constitutional prohibition that "no person shall hold the office of judge or justice of any court longer than until and including the last day of December next after he shall be seventy years of age," the personnel of the present Court of Appeals of New York will undergo a radical change within the next two years, when four of the seven regularly elected judges will automatically retire from the bench. They are Judges Irving G. Vann, of Syracuse, and Albert Haight, of Buffalo, who will reach the age limit on Dec. 31 next, and Chief Judge Edgar M. Cullen, of Brooklyn, and Judge John Clinton Gray, of New York, who will retire on Dec. 31, 1913.

"PAUPER CASE" INQUIRY IN CHICAGO. — Investigation begun recently by the Chicago Bar Association tends to show the existence of an alleged combine between certain lawyers who have handled many "pauper cases" in Cook county courts. Forty-six attorneys will be summoned to appear before the solicitation committee and tell what they know, according to Chairman Joseph B. Burtt. The forty-six have had 1,503 pauper cases since Jan. 1, 1908. They will be asked how they got the business, whether through adjusters or solicitors or advertising. Some persons owning flat buildings, it is charged, have taken the pauper oath and escaped paying court costs. This irregular practice and other improper acts are subjects of inquiry.

DEATH OF FORMER NEW YORK JUDGE. — Truman C. White, ex-justice of the New York Supreme Court, the man who pronounced the death sentence on Leon Czolgosz, assassin of President McKinley, and presided at many famous trials, died at Buffalo, N. Y., on Feb. 7. Justice White retired from the bench in 1910, when he reached the prescribed age limit. Ex-Justice White was born in Perrysburg, N. Y., in 1840, and was educated at the country schools and the Springville Academy. At the first call for troops in the Civil War he enlisted as a private and served till 1865, reaching the rank of first lieutenant. On his return to private life he took up the study of law under Judge Stephen Lockwood, and in 1867 was admitted to the bar. He began practice in Buffalo that same year. In 1891 Mr. White was elected a judge of the Superior Court of Buffalo, serving in that capacity till Jan. 1, 1896, when this court was abolished.

JUDGE WILLIAM LOCHREN DEAD. — William Lochren, for many years judge of the United States District Court, died in Minneapolis on Jan. 27. Judge Lochren was born in County Tyrone, Ireland, April 3, 1832. He began the study of law in 1854 in Franklin county, Vermont, and was admitted to the bar in June, 1856. He went to St. Anthony, Minn., the following month. In April, 1861, he enlisted with the First Regiment, Minnesota Volunteers, and participated in all of the battles of the Army of the Potomac. He was made a first lieutenant after the battle of Gettysburg. In 1869 and 1870 he was a member of the Minnesota State Senate. He was city attorney of Minneapolis in 1877 and 1878, and was judge of the District Court there when appointed commissioner of pensions. He was appointed to that office in 1893 by President Cleveland, who also appointed him to the United States District bench in 1896, from which position he retired in 1908.

NEW YORK COURT OF ARBITRATION. — After a lapse of seventeen years the Business Men's Court of Arbitration held its

first session on Feb. 5 at the Chamber of Commerce in New York city. Charles L. Bernheimer, chairman of the Chamber of Commerce committee on arbitration, conducted the proceedings and swore in the official arbitrators. The court has been reorganized because of the "incompetency of the courts and the law's delay," says its advocates. It was established in 1768, and was one of the first institutions of the Chamber of Commerce. In 1861 its jurisdiction was extended, and in 1874 the State voted a salary of $10,000 a year to the official arbitrator. In 1895 the salary was taken away and the court broke up. The Chamber of Commerce got out an old statute last year, showing that the court was legal, and in June the arbitration committee was sworn in by Justice Vernon M. Davis. Out of the 215 leading business men asked to act as arbitrators it is said 209 accepted. Mr. Bernheimer says the court can wind up in a day a case that will take a week ordinarily in the regular tribunals.

NOTED POLITICIAN AND LAWYER DEAD.— Gen. James B. Weaver, candidate for President in 1880 on the Greenback-Labor ticket, and in 1892 on that of the Populists, died at Des Moines, Ia., on Feb. 6. General Weaver was born in Dayton, Ohio, June 12, 1833, received a common-school education and was graduated from the Cincinnati law school in 1856. He removed to Iowa and in April, 1861, enlisted as a private in the Second Iowa Volunteers, of which, by successive promotions, he became colonel in October, 1862. He was brevetted a brigadier-general in 1864. After the war, as a Republican, he was an assessor of internal revenue, a district attorney and editor of the Iowa *Tribune*. He was elected to Congress as a Greenbacker in 1878 and as a Democrat in 1884 and 1886. After the decline of Populism he returned to the Democracy and was a devoted follower of W. J. Bryan. General Weaver was religious, in his earlier years popular as a baritone singer, and did not drink, smoke, or swear. In 1880 he received 307,306 votes for President, and in 1892, 1,041,028, having twenty-two electoral votes.

FAMOUS LIBRARY LOST TO LAWYERS. — The destruction of the Lawyers' Club, which for years had been one of the show places of New York and the daily meeting place of hundreds of prominent lawyers, will prove a big loss to the legal fraternity. The loss is not measured by dollars, although the pecuniary damage will reach $200,000, but the members will miss their magnificent library of 20,000 volumes, not to speak of the collection of portraits of jurists and lawyers, which cannot be replaced. The parlors of the club were on the fifth floor of the Equitable building, on the Broadway front. The library was on the sixth floor, overlooking Nassau street. The rooms were connected so as to make the passage through the club quarters continuous. The appointments of the club were of the richest, no expense having been spared to make the quarters among the handsomest of similar organizations in the city. The membership of the club approximated 600. The rooms attracted not only New York lawyers, but attorneys from all parts of the United States and Europe. On the walls were several hundred portraits and engravings of noted jurists and lawyers connected with the bench and bar of New York for a hundred years. In the library were complete collections of federal and State law reports, works of reference of every description, and thousands of pamphlets of value to lawyers, besides other books and documents.

NEW YORK JURIST DEAD. — Justice Henry B. Coman of the New York Supreme Court died at his home in Morrisville, N. Y., on Jan. 10. Justice Coman was born in Morrisville, Madison county, N. Y., in 1858. He was educated at the Morrisville Union school and at Cazenovia Seminary, and was admitted to the bar in 1880. For nine years he was clerk of the Surrogate's Court of Madison county. For five or six years he was president of the village of Morrisville. In 1899 he was appointed to a position in the attorney-general's office in Albany, and early in 1900 was appointed a deputy attorney-general, charged specially with enforcing and defending Governor Roosevelt's Franchise Tax Law. In 1901 Mr. Coman was appointed first deputy attorney-general. Mr. Coman, with J. Newton Fiero, represented the State from the beginning to the conclusion of the proceedings before ex-Judge Robert Earl, acting as referee of the Supreme Court, to test the constitutionality of the Franchise Tax Act. He ran for attorney-general on the Republican ticket in 1902, but was unsuccessful. On Jan. 1, 1907, he became a Supreme Court justice; and, had he lived, his term would not have expired till Dec. 31, 1920.

ELECTED HEAD OF HARVARD ALUMNI. — At a meeting of the executive committee of the Harvard Alumni Association, held in January, Prof. John Chipman Gray was elected president of the association for the coming year. Professor Gray is one of the best-known jurists of this country. He is of the class of '59 A. B., of the class of '61 LL. B., Royall professor of law at the Harvard law school, and senor member of the firm of Ropes, Gray & Gorham, of Boston. Professor Gray was admitted to the bar immediately on his graduation from the law school in 1861, but entered the army at once, and served to the end of the Civil War. After the war he returned to Boston and began practicing law. He was editor of the *American Law Review* for four years. In 1869 he became a lecturer in the Harvard law school. In 1875 he was appointed Storey professor of law. In 1883 he was promoted to the Royall professorship, which now for nearly thirty years has been associated with his name. In 1894 he received the degree of LL. D. from Yale University, and in the following year the same degree from Harvard. For many years Professor Gray was associated in the practice of law with John C. Ropes, '57, and with William C. Loring, '72, now a judge of the Supreme Court of Massachusetts, the firm being known as Ropes, Gray & Loring. On Judge Loring's retirement from the firm the name became Ropes, Gray & Gorham. The firm now consists of Professor Gray, C. R. Clapp '84, Robert S. Gorham '85, Roland W. Boyden '85, T Nelson Perkins '91, Roland Gray '95, and H. L. Shattuck '01. It is commonly understood that Professor Gray has more than once refused a position on the Massachusetts Supreme Court. He is generally regarded as the leading authority in this country on the law of real property, and as a master of the subject of perpetuities his knowledge is unrivaled.

SOUTH CAROLINA BAR ASSOCIATION. — The nineteenth annual meeting of the South Caroline Bar Association was held on Jan. 24 and 25 at Columbia, S. C. The president's address was delivered by P. H. Nelson, and the annual address by Judge Alton B. Parker, of New York. Other speakers were Chief Justice Eugene B. Gary, of the South Carolina Supreme Court, who discussed "Legal Ethics," and T. P. Cothran, of Greenville, who read a paper on "Reforms in Taxation." At the annual banquet the list of speakers included Gov. Cole L. Blease, Hon. Alton B. Parker, Hon. Ira B. Jones, James H. Fowles, S. E. McFadden, and Knox Livingston. The following officers were elected: President, Knox Livingston, Bennetsville; vice-presidents, first circuit, B. H. Moss, Orangeburg; second circuit, D. S. Henderson, Aiken; third circuit, R. O. Purdy, Sumter; fourth circuit, E. C. Dennis, Darlington; fifth circuit, D. C. Ray, Columbia; sixth circuit, C. W. F. Spencer, Rock Hill; seventh circuit, H. K. Osborne, Spartanburg; eighth circuit, D. A. G. Ouzts, Greenwood; ninth circuit, T. W. Bacot, Charleston; tenth circuit, B. H. Morgan, Greenville; eleventh circuit, George Evans, Edgefield; twelfth circuit, M. C. Woods, Marion. Executive committee, W. G. Sirrine, Greenville; Alfred Huger, Charleston; J. P. McGill, Florence. Secretary, E. L. Craig, Columbia; treasurer, R. E. Carwile, Columbia.

THE NEW YORK STATE BAR ASSOCIATION held its thirty-fifth annual meeting in New York city on Jan. 19 and 20. The president's address by United States Senator Elihu Root was on the subject "Judicial Decisions and Public Feeling." The annual address was delivered by Secretary of State Philander C. Knox, his topic being "The Monroe Doctrine and Some Incidental Obligations in the Zone of the Caribbean." The general topic for discussion at the meeting was "The Reform of Procedure in the Courts of New York." Addresses on special topics included the following: "Commencement of Action," by C. Andrade of New York; "Preparation for Trial and Trial Practice," by George Gordon Battle and Joseph M. Proskauer of New York; "Judgments," by Neal Dow Becker of New York; "Appeals," by Everett P. Wheeler of New York; "Satisfaction of Judgment," by Henry A. Forster of New York; "Special Actions and Special Proceedings," by J. Newton Fiero, dean of the Albany Law School; "The Practice in Surrogate's Court," by the two surrogates of New York, John P. Cohalan and Robert Ludlow Fowler. Papers were also read by Governor Simeon E. Baldwin, of Connecticut, on "How Civil Procedure Was Simplified in Connecticut;" by Mr. Justice Riddell, of the Court of King's Bench of Ontario, on "Procedure in Ontario;" by Raymond Fellows, of Maine, on "The Merits and Demerits of the Common Law Practice in the State of Maine;" and by William A. Morgan, of Rhode Island, on "Courts and Civil Practice in Rhode Island." At the annual banquet on January 20, Senator Root presided, and the speakers were President Taft; M. Jean J. Jusserand, the French ambassador; Joseph H. Choate, former United States ambassador to England; Robert C. Smith, K. C., of the Montreal bar; and Supreme Court Justice Almet F. Jenks, of Brooklyn. The association elected the following officers: President, William Nottingham, Syracuse; secretary, Fred E. Wadhams, Albany; treasurer, Alfred Hessberg, Albany; vice-presidents — first district, William G. Choate, New York; second district, James D. Bell, Brooklyn; third district, D. Cady Herrick, Albany; fourth district, Francis A. Smith, Elizabethtown; fifth district, Jerome L. Cheney, Syracuse; sixth district, Michael H. Kiley, Cazenovia; seventh district, Richard E. White, Rochester; eighth district, Franklin D. Locke, Buffalo.

English Notes.

TAKING PHOTOGRAPHS IN COURT. — During the hearing of a case at Bradford recently, one of the prisoners drew the attention of the stipendiary magistrate to the presence of a photographer, asking, "Is it necessary for any one to take snapshots and then laugh at you?" The stipendiary, having ascertained that photographs had been taken, said it was most improper to photograph any one in court, and the plates must be handed over. He ordered the police to see that the plates were handed over, and in future to see that no photographic apparatus was taken into court. The stipendiary inquired the name of the photographer and the newspaper for which the pictures were intended, after which the photographer was deprived of his plates.

BEQUESTS OF FURNITURE AND OTHER EFFECTS IN A DWELLING HOUSE. — The case of *Re* Lea; Wells *v.* Holt (104 L. T. Rep. 253) may be usefully referred to as reminding practitioners how careful they ought to be in taking instructions for, and in framing, bequests of furniture and other effects in or in and about a dwelling house. There are perhaps few clauses in a will which require more, or receive less, attention, especially in these days of new inventions, such as motor cars, electric light, and flying machines. In particular, it should be made clear whether jewelry and watches, or money and securities for money, are intended to pass. In the case referred to, it was decided that, under a gift of furniture and household effects "and all other the contents of" a dwelling house, everything in the house passed, including £40 in Bank of England notes and cash, and certain jewelry, including jewelry which was in the house at the date of the will, but which had been subsequently deposited at the bank without the testatrix's instructions, although she was afterwards told that this was done.

THE REPUBLICATION OF THE MOTU PROPRIO. — Much interest has been aroused in Ireland over the publication of the *motu proprio,* an unsealed document which is used in the administration of the Papal Court, from the Pope, addressed, apparently, to all Roman Catholics. The decree was published in the Catholic press over four weeks ago, but apparently escaped notice until the 21st of January, when it was published in a Dublin daily paper. It is a document centuries old, but its republication now is somewhat remarkable. It forbids Roman Catholics to commence litigation against their clergymen in any civil or criminal court without the leave of the ecclesiastical authorities, and penalties are provided for violation of its provisions. If this translation of its terms is to be accepted, it is manifest that even its circulation would be an offense under the British constitution. The courts of law are open to all His Majesty's subjects, and any publication which tends to obstruct the course of justice or the free access of citizens to them seems to be clearly unlawful and even criminal. The Roman Catholic Archbishop of Dublin has published an important letter on the subject of the *motu proprio.* The archbishop points out that this document is not an exacting one, but that it merely defines the meaning of terms in a constitution upon the subject published in 1869. As to whether this decree is in actual operation in Great Britain, his Grace emphatically asserts that it is not. It is not in operation in countries where the contrary was provided by concordats entered into between the Roman Pontiff and the governments concerned, and it is not in force in Great Britain, not because of such concordats, but because by custom it had ceased to be operative. His Grace goes on to quote from the important evidence given by Cardinal Cullen in the case of O'Keefe *v.* Cullen (1873 Ir. Rep. 7 C. L. 319), interpreting the original decree and pointing out the countries where it had no operation by reason of a custom which has now in fact been substituted for the old law. The evidence now republished is very instructive. It may be worth while to point out that there is another report of that exceedingly interesting trial — namely, Kirkpatrick's special report, published by Longmans, 1874; but for lawyers the arguments on demurrer and the new trial motion are equally interesting and important.

SUICIDE BY ACCUSED DURING TRIAL. — The tragic death by his own hand of Mr. Thomas English Stephens, a member of the bar, whose trial on a charge of libelling his son was proceeding at the Old Bailey and had occupied the attention of the court for two days, recalls one of the most terrible incidents in the records of the state trials. On the 23d April, 1795, the trial of the Rev. William Jackson, an Anglican clergyman, who was an emissary of the French National Directory, began in Dublin for high treason. He was betrayed by a solicitor named Cockayne whom Mr. Pitt had deputed to accompany him to Ireland as a pretended accomplice in his design. The evidence was conclusive, and, after a trial which appears to have been perfectly fair, he was found guilty, but recommended to mercy. He was brought up to receive judgment on the 30th April. The spectators were struck with his ghastly pallor, but his arms were crossed and his features set with a desperate resolution. When asked why sentence should not be pronounced, he moved silently and pointed to his counsel, who raised a technical objection and argued it at length. Before the discussion had terminated Jackson fell down in the agonies of death. The doctor was sent

for, and the Earl of Clonmell, the Lord Chief Justice, inquired, "Is the prisoner competent to hear the judgment of the court?" The doctor replied, "My lord, he is dead." He had received that morning, apparently from the hand of his wife, a dose of arsenic. The court could not sentence him, and his property was saved to his family. It is said that as he entered the court he had whispered with mournful triumph to Curran, who was one of his counsel, the dying words of Pierre, in Otway's "Venice Preserved," "We have deceived the Senate." The effect of the death of Jackson on the Irish Lord Chief Justice when he was about to pronounce sentence on him is thus described by himself in his diary, written in the very day of the tragedy: "April 30, 1795. Recollect the death of that Jackson at the moment that judgment was about to be pronounced upon him. This should be a new judicial era in your life. As to regimen and exercise, to ride and walk as much, to eat and sleep as little as possible, to read law as much, to idle as little as you can, and never to fret at all; to laugh and smile as much, to frown and sulk as little as may be. Turn each moment to the best account, and make the most of each good occasion and the best of every bad one. Look to God and yourself only." (Fitzpatrick's Ireland before the Union, p. 50.)

ALPHABETICAL LETTERS AS REGISTRABLE TRADEMARKS. — Whatever divergence of opinion there may be as to the expediency of permitting mere letters of the alphabet to be registered as a "distinctive mark," under section 9, subsection 5, of the Trademarks Act 1905 (5 Edw. VII., c. 15), there can be little doubt that, as regarded the particular letters — in their written form at any rate — that were in question in the recent case of *Re* W. and G. Du Cros Limited's Trademark applications, it was inadvisable that the registration thereof should have been refused at the first stage of the application. As was said by the Master of the Rolls, evidence of user for three years, though limited in area and not large in amount, was sufficient to entitle the applicants to be allowed to proceed with their application to the second stage. But with respect to the policy of allowing letters, however they may be portrayed, to be treated in general as a registrable trademark, that appears to be open to many objections. It is true that at common law, and before the passing of any of the Trademarks Acts, a letter or combination of letters might have been so used as to establish a title thereto as a good trademark. See Kinahan *v.* Bolton, 15 Ir. Ch. Rep. 75; Motley *v.* Wownman, 3 My. & Cr. 338. And although letters were not, until the Act of 1905, expressly specified as a registrable trademark unless as an old mark in use before the year 1875, yet by section 3 of that act the definition of a mark includes a "letter." Nevertheless, no absolute right is thereby conferred to have a letter or combination of letters registered. It has, according to subsection 5 of section 9, to be deemed to be a "distinctive mark" by the Board of Trade or the court — that is to say, "adapted to distinguish the goods of the proprietor of the trademark from those of other persons." In the present case, the first mark sought to be registered consisted of "W. & G." written in a peculiar style and with a considerable flourish — that is to say, portrayed in a running hand at an angle from the horizontal with an exaggerated thickening of the component parts of each letter and a distorted tail to the "G." It had been in use for three years before the application. The second mark was in ordinary block type and had never been used. As to the first, even supposing that, owing to the eccentricity of the portrayal of the letters, joined by the usual symbol denoting the conjunction, the same might possibly be viewed as "distinctive," the fact that the second was in ordinary block type placed it on an entirely different footing. There could be nothing "distinctive" about it. In the words of the Master of the Rolls, that was "an illegitimate attempt to take exclusive possession of a part of the alphabet to the detriment of future traders who may honestly desire to put their own initials on their own goods." Such a monopoly could not fail to have injurious results.

REMARKABLE MARRIAGE CASE IN IRELAND. — A singularly interesting and remarkable marriage case, entitled Usher *v.* Usher, came before Mr. Justice Kenny, sitting at nisi prius, in Ireland, last month. The parties were both Roman Catholics. The husband sought a decree of nullity of marriage with the respondent on the ground that the same was null and void by reason of the fact that it was celebrated in the presence of only one witness, and marriages between Roman Catholics in Ireland since the Council of Trent (1545–1563) require two witnesses. The ceremony was performed in the plaintiff's house by the parish priest of both parties, permission having been given by the bishop so to do, and the plaintiff did not wish the fact of the marriage to be announced or published in any way. There was issue, one child, of the union. The jury by consent found a special verdict that the parties went through what purported to be a marriage ceremony on the occasion, in accordance with the foregoing facts. Strange as it may appear, there is no statute whatever regulating marriages between Catholics in Ireland; they are governed entirely by the old common law, and the famous Commission of 1868 undoubtedly reported that Roman Catholic marriages in Ireland were valid according to law if they were celebrated by a clergyman of that church, both persons mutually consenting before him to accept each other. Counsel for the defendant recited the finding of this commission, and relied upon what happened in the case as conforming entirely to what was required by common law. They cited R. *v.* Millis (1843, 10 Cl. & Fin. 543), Beamish *v.* Beamish (9 H. L. Cas. 274), and *Re* M'Laughlin (1878, 1 L. Rep. Ir. 421) for the defendant. The Roman Catholic bishop of Clonfert was examined and stated that the marriage here was invalid from the point of view of the Roman Catholic Church because there were not two witnesses, and by reason of this infirmity the parties, in the words of one of the doctrinal resolutions of the Council of Trent referred to, "were incapable of contracting a lawful marriage." "Had the consent remained," said the bishop, "the marriage might have been rendered valid, but, the plaintiff having now withdrawn his consent, Rome itself could not by virtue of any of its dispensing powers render it lawful." This was the case for the plaintiff, and counsel argued that the parties entered into a contract to secure a Catholic marriage according to the rites and ordinances of the Catholic Church,

and it was demonstrated by the bishop's evidence that there was no marriage at all. It was true the law did not prescribe a form, but it recognized what was formally and duly done by the church and nothing else. The answer to this, of course, was that the decrees of the Council of Trent were the decrees of a foreign court, which are not binding in this country. See O'Keefe *v.* Cardinal Cullen, 1873, Ir. Rep. 7 C. L. 319. Mr. Justice Kenny reserved judgment, but subsequently delivered an opinion declaring the marriage valid.

Obiter Dicta.

FROM HIM WHO HATH NOT, ETC. — In Moore *v.* Little, 41 N. Y. 66, the plaintiff recovered.

ONE OF THE IMMORTALS. — From the report in 68 W. Va. 105, it appears that "Woods Gum" was convicted of assault with intent to kill.

BUT HE DIDN'T. — In Sultan R., etc., Co. *v.* Great Northern R. Co., 58 Wash. 604, the name of the president of the plaintiff corporation was "U. Loose." There was a verdict for the plaintiff which was affirmed on appeal.

A MODEL SUNDAY SHOW. — In A. H. Woods Production Co. *v.* Chicago, etc., R. Co., 147 Ill. App. 568, Mr. Justice Holdom held that the performance on Sunday of the old favorite, "Nellie, the Beautiful Cloak Model," did not disturb the public peace or good order of society.

A MIGHTY HARD LAW TO ENFORCE. — "Under sections 438–440 of the Penal Code of 1895, persons who go to churches must not carry liquor or have liquor either in their insides or on their outsides." Thus does Judge Powell interpret the Georgia statute in Burden *v.* State, 68 S. E. 622.

WHICH DOOR? — "Under the statute limiting the liability of hotelkeepers for the loss of property of their guests (Act No. 42, Pub. Acts, 1905), the question of the suitability of the lock on the door of the plaintiff, who occupied a room," etc. See syllabus, Weadlock *v.* Swart, 163 Mich. 602.

THE WAY TO APPEAL. — A lawyer arguing a motion involving a technical point before Supreme Court Justice Gerard in New York city a few days ago when about fifty more cases were waiting to be heard asked the court:

"How will I get this question up before the Appellate Division, your honor?"

"You might take it up in the subway," remarked the court wearily as he called the next case.

BEATS THE WOODEN INDIAN. — "Handsome girls are ordinarily employed around hotels for the purpose of selling cigars, and no doubt many susceptible men are induced to buy more cigars than they otherwise would by reason of the employment of this delivery agency." *Per* Dunbar, J., in Seattle *v.* Decker, 58 Wash. 501.

REFUSED TO FOLLOW WEIGHT OF AUTHORITY. — "The principal authorities cited are Exodus, Deuteronomy, and Leviticus. Much as it respects the laws referred to, the court feels that it is bound by the act of the Kansas legislature regulating labor under the sociological conditions existing in this state." *Per* Burch, J., in State *v.* Ottawa, 84 Kan. 100.

MIGHT HAVE LEFT IT AT HOME. — In State *v.* Ware, 58 Wash. 531, the following colloquy is said to have taken place on the examination of a juror in the trial court:

"You have an opinion that because Ware shot and killed Corp, that he committed a crime?

"Yes, sir.

"And you have that opinion with you now?

"Yes, sir."

BATTING THE COURT'S EYE. — "Mr. Fitzgerald: I expect to connect this, your honor.

Judge: You can make a lot of declarations.

Mr. Fitzgerald: I except to what the court says.

Judge: Every time the court speaks, taken an exception.

Mr. Fitzgerald: I will.

Judge: Every time the court bats his eye, taken an exception." See State *v.* Phillips, (Wash.) 109 Pac. 1047.

BOTH WON. — We are in receipt of the following true copy of a judgment rendered recently by a justice of the peace in one of the rural precincts of Utah, as entered in his docket:

"After rendering of the verdict by the jury, the court by request of both parties suspended the rendering of the judgment until Jan. 20, 1912, at which time judgment was entered by the court in accordance with the verdict of the jury. It is therefore considered by me that said cause be dismissed and the plaintiff pay the costs of this action taxed at $19.75.

"(b) Plaintiff have and recover of the defendant the sum of $8.25 and costs herein taxed at $19.75, that this draw interest at the rate of eight per cent. per annum, and that execution issue therefor."

Our correspondent says an appeal has been taken from the judgment. Who took it?

AN EXCHANGE OF COURTESIES. — A prominent New York justice got a jolt the other day, and he is telling the story of it yet. He said that late one afternoon he gave a case to a jury and that it was 4.30 o'clock the following morning before the jury agreed upon a verdict.

"I waited for the verdict," said the justice, "and after it was returned I told the jurors that, as it was possible that most of them were married men, if they desired I would give to each a certificate that he had been detained until 4.30 o'clock in the morning on jury service.

"The jurors consulted together for a few minutes," continued the justice, "and then the foreman arose and said, 'We thank you for your consideration and appreciate the kindness of your offer and desire to say that if your honor needs a certificate to the effect that you were detained until 4.30 o'clock in the morning waiting for our verdict we will gladly so certify.'"

The justice hastily declined this kind offer with thanks and just as hastily adjourned court.

THE VALUE OF A MAN'S AFFECTIONS. — Who knows better the value of a man's affection for his wife, the wife herself who has been wrongfully deprived thereof, or the court that may happen to sit in judgment on the case? Sometimes, at least, the court sooms to think itself the better judge. Such was the case in Heisler *v.* Heisler, 127 N. W. 823, wherein the plaintiff wife, suing for the alienation of her husband's affections, impressed the jury with the belief that she had been damaged in the sum of $7,000. The appellate court admitted that the plaintiff liked her husband and was "entitled to the damages suffered because of the alienation of such affection as he was capable of entertaining." But that affection was not worth any $7,000, no matter what the wife thought. Not by a long shot! Said the court: "Nor can the loss of Willie as a husband be deemed very great when weighed in the scales of justice. A man who, instead of resenting unfounded insinuations against his wife, even when made by his mother, will hie himself to the haymow to weep, and then abuse her whom he has promised to protect, is hardly worth quarreling over." About $2,000 was enough for the loss of Willie, thought the court.

JUDGE LAMM. — We have simply got to take some further notice in these columns of Judge Lamm of the Supreme Court of Missouri. We have let him alone long enough, considering that he won't let us alone, so to speak. Never do we pick up a volume of the Missouri reports that Judge Lamm does not fairly leap forth from the pages proclaiming himself the incomparable humorist and literator of the American bench. We spurn indignantly the suggestion of one of our correspondents that the excessive number of volumes of Missouri reports is due to "Lamm-blasting the English language." Judge Lamm does no harm to the English language. He enriches it just as he enriches the store of common knowledge of every one who has the time and the inclination to read his opinions. From time to time we propose to present to our readers extracts from the works of Judge Lamm, since we have both the time and the inclination to which we have made reference and our readers possibly have not. How will the following essay on "Milk," contained within the opinion in St. Louis *v.* Jud, 236 Mo. 1, do for a starter?

Milk. — "The housekeeper who buys milk for her table or children should be protected from adroit tricks cheating her judgment by deceiving her eyes. Peradventure, goldenhued milk speaks of cows browsing in dewy meadow grasses. It harks back to blue grass and clover with a sprinkle (as suggested by a learned brother) of buttercups and daisies — not to annotto or any other dye. If such good woman wants annotto in her milk, the policy of the State is to let her put it in herself. Fireside lore and philosophy connect rich yellow milk with the *food* of the cow, not with an artificial dye like annotto. Witness the chimney-corner adages: Barley straw's good fodder — when the cow gives *water;* It is the *head* of the cow gives milk; The cow gives milk through her *mouth* (*i. e.,* as she is fed). We conclude that annotto in milk is not only against the policy of our State, and in contravention of a valid ordinance of St. Louis, but it is a species of petty treason to domestic philosophy and the simple verities of nature itself. Learned counsel for the city said, *ore tenus,* in a flourish of rather startling rhetoric, that the city child now starts on its journey in life flanked by annotto on one side and formaldehyde on the other. We shall not pass on the issue thus raised, in a hot foot of argumentation, but content ourselves with affirming the judgment on the cold record."

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